

(22,571.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 950.

CITY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

EAST TENNESSEE TELEPHONE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF KENTUCKY.

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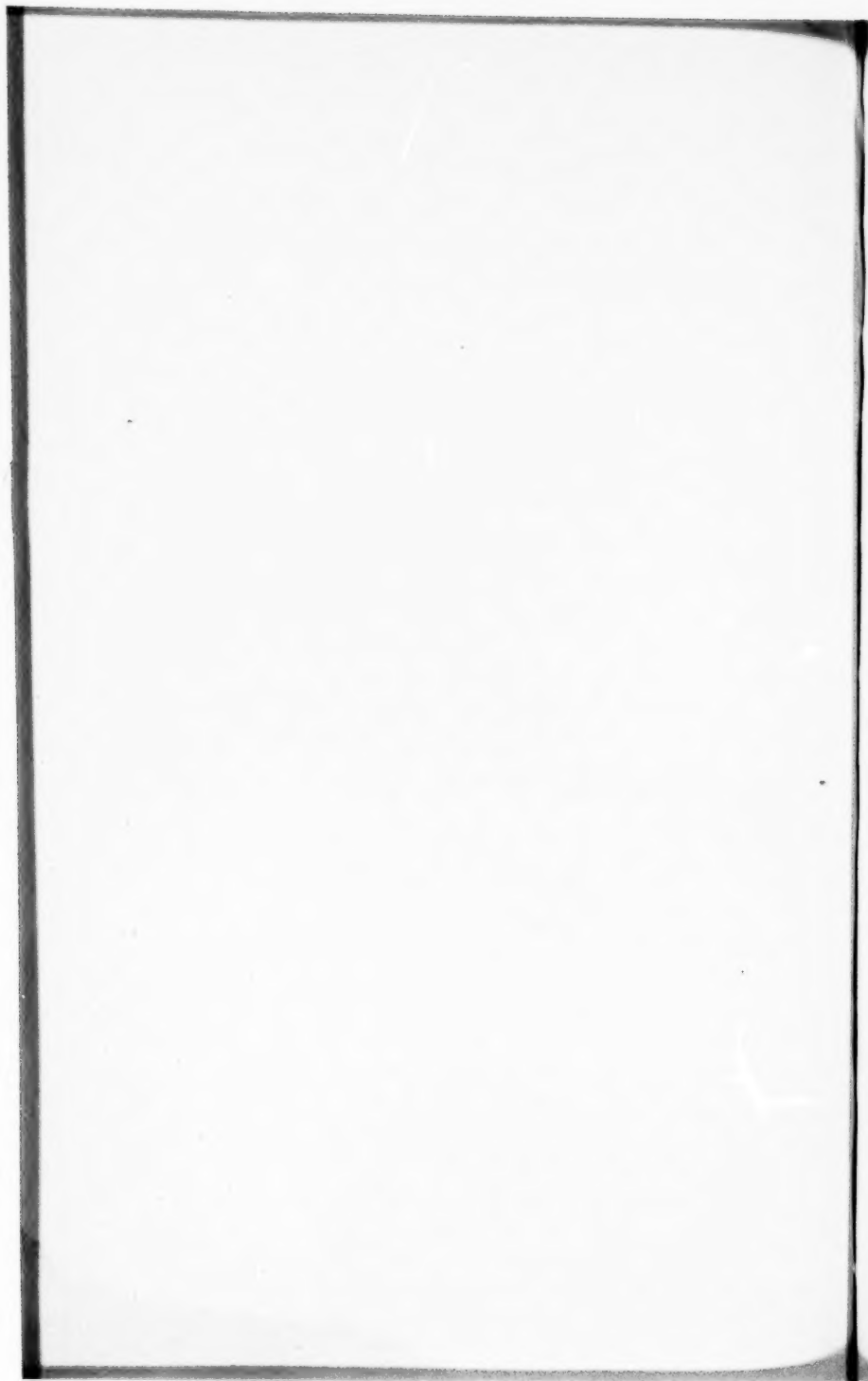
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1 UNITED STATES OF AMERICA:

Sixth Circuit and Western District of Kentucky.

I, W. A. Blackburn, Clerk of the Circuit Court of the United States, for said Western District of Kentucky, do hereby certify that the papers hereto attached are a full, true, perfect and correct copy of the bill, answer, all pleadings, records, orders, depositions, exhibits and all proceedings in the said Court, as the same now appears of record, and upon the files in my office in the following cause, to-wit: East Tennessee Telephone Company vs. City of Paducah.

In testimony whereof, I have hereunto set my name and affixed the seal of said Court, at my office, in the City of Paducah, Ky., this the 20th day of February A. D. 1911 and of the Independence of the United States 135th year.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

W. A. BLACKBURN, *Clerk.*

2 UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To East Tennessee Telephone Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C. on the * 8th day of March next, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, wherein City of Paducah, Kentucky is the appellant and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellee as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 8th day of February in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty fifth.

WALTER EVANS, *Judge.*

*Not exceeding 30 days from the day of signing.

Service accepted February 13th, 1911.

W. L. GRANBERRY &
 WHEELER & HUGHES,
For East Tennessee Telephone Co.

Executed the above Citation on East Tennessee Telephone Company by delivering a true copy of same to J. L. Joynes, manager of

said Company at Paducah, Ky. Executed at Paducah, Ky., February 18th, 1911.

G. W. LONG,
U. S. Marshal, Western Dist. of Ky.,
By ELWOOD NELL, D. M.

[Endorsed:] East Telephone Company vs. City of Paducah.
Citation.

List of Counsel:

James Campbell, Jr., and Hal S. Corbett, solicitors for the City of Paducah; residence, Paducah, Ky.

Wheeler & Hughes, of Paducah, Ky., solicitors for East Tennessee Telephone Company, and W. F. Granberry, of counsel, of Nashville, Tennessee.

In the United States Circuit Court for the Western Division of Kentucky. In Equity.

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH, KENTUCKY.

To the Honorable the Judges of the Circuit Court of the United States in and for the Western Division of Kentucky, sitting at Paducah, Kentucky:

The East Tennessee Telephone Company, a corporation organized under and pursuant to the laws of the Commonwealth of Kentucky, and having its principal office or place of business in the city of Bowling Green, in said State, brings this, its bill of complaint against the city of Paducah, Kentucky, a municipal corporation created and existing under and pursuant to the laws of the Commonwealth of Kentucky; and,

I.

Thereupon your orator complains and says that on May 26, 1880, the East Tennessee Telephone Company was duly organized under the laws of the State of New York, for the purpose of building telephone and telegraph lines and exchanges from the city of New York, by some convenient route through or across the intervening states to the city of Knoxville, in the State of Tennessee, and thence to the city of Chattanooga, in said State, and to various points and places within the respective limits of said cities; and from Chattanooga or Knoxville, by some convenient route, to the cities of Frank-

5 fort and Lexington, in the State of Kentucky, and to various points and places within or about said last mentioned cities, or either of them, and also to any other points or places, within or throughout the said States of Tennessee and Kentucky, connecting together the said cities herein mentioned, or points or places within or about the same, including telephonic exchange, or district stations, as it may be desired to establish within the territory herein mentioned.

And, in order to conduct a telephone business anywhere in the United States, it was necessary to secure a patent right, which was at that time owned by a corporation organized under the laws of the State of New York, and known as the American Bell Telephone Company; and, no person, firm or corporation could conduct a telephone business or telephone apparatus, without the permission of the aforesaid American Bell Telephone Company; and, thereupon, the East Tennessee Telephone Company procured the exclusive right to conduct a telephone business and use telephone apparatus under said patent rights in various cities in Kentucky and Tennessee. Said license or right to use telephones and telephone apparatus in the said city of Paducah, Kentucky, and County of McCracken, as well as various other counties and cities in the states of Kentucky and Tennessee, was thereupon purchased and acquired by the East Tennessee Telephone Company for the full life of said patents or any improvements thereon. In the exercise of its rights, under said patents, the East Tennessee Telephone Company did erect various exchanges in the States of Tennessee and Kentucky, and among other places, it erected a telephone exchange in the city of Paducah and in the County of McCracken; and, these various exchanges were connected together by pole lines and telegraph circuits, affording easy and rapid intercommunication between patrons located in the various cities in said two States.

6 II.

On November 1, 1880, the following communication was caused to be addressed to the Mayor and City Council of the City of Paducah, Kentucky, by the East Tennessee Telephone Company, to-wit:

"To His Honor Mayor and City Council of the City of Paducah, Kentucky:

"We, the subscribers, humbly petition your Honorable Body for permission to erect poles and hang wires thereon throughout your city, for the purpose of establishing a telephone exchange for the convenience of your citizens.

"Trusting that your Honorable Body will grant our petition, we are,

Respectfully,

BELL TELEPHONE COMPANY.
W. G. WASHBURN, Agent."

(Referred to Street Committee.)

And on November 15, 1880, the following appears of record, upon the proceedings of the Mayor and City Council of said City:

"To the Honorable Mayor and City Council of Paducah.

"GENTLEMEN: We your committee, to whom was referred the petition of W. G. Washburn, agent of Bell Telephone Company, in the matter of erecting telephone poles throughout the city, would respectfully recommend that said prayer be granted, on the following conditions, viz:

"The poles not to be less than thirty-five feet in height, ten inches in diameter at the base, and good proportion all way up to top, to be painted red at base and white from the red to the top of pole."

E. J. HOLLAN,
W. E. AUGUSTUS,
Committee."

"On motion, the report was received, recommended and concurred in."

In pursuance of said authority obtained for the East Tennessee Telephone Company, through its agent and representative, W. G.

Washburn, the East Tennessee Telephone Company proceeded at once to erect a telephone exchange and on June 7 1, 1881, it had fifty subscribers to said exchange, and from time to time additional poles were erected, additional wires strung thereon, as the number of subscribers increased, until 1887, when the number of subscribers to said exchange had increased to 92. Many poles had been erected and much additional wire strung to serve the patrons to that exchange.

On the first day of April, 1887, an agreement was entered into between the city of Paducah and the East Tennessee Telephone Company, with reference to the joint use of poles belonging to the city and the telephone company. Said agreement was in words and figures, as follows, to-wit:

This agreement, made this first day of April 1887, between the East Tennessee Telephone Company, hereinafter called the Telephone Co., and the City of Paducah, hereinafter called the lessee, witnesseth:

First. The Telephone Co. in consideration of the payment which the said lessee hereby agrees to make to the Telephone Co. of a pole rental charge amounting to One Dollar per annum, payable annually in advance, hereby grants to the said lessee the right to attach to, and maintain at its own expense, upon the poles of the telephone company in the city of Paducah, the wires of their fire alarm system, together with the necessary insulators and fixtures therefor.

Second. The right of occupancy hereby granted is to be exercised by the said lessee, subject to the regulations of the Telephone Co., and in such manner as shall not conflict with the Telephone Co.'s own use of said poles, nor interfere with the working or use of its

wires thereon, and this agreement shall be terminable at the will of either party at any time hereafter upon thirty days' written notice to the other of an intention to terminate the same, when said wires and fixtures shall be removed from said poles without delay, at the expense of said lessee.

Third. The lessee hereby agrees to allow the Telephone Co., the use of any poles belonging to the said lessee, upon the same terms as stated above, that the telephone company may need in extending their service, the said telephone company being bound by the condition of second section.

Fourth. No use of the telephone Co.'s poles under this lease, however, extended, shall be taken as creating or vesting in said lessee any ownership or property in the said poles of the Telephone Co.

8 Fifth. This lease is personal to said lessee, and is not assignable.

In witness whereof, the parties hereto have hereunto set their hands, the day and year first above written.

THE EAST TENNESSEE TELEPHONE CO.,

By N. R. YOUNG, *Gen'l Supt.*

CITY OF PADUCAH,

By CHAS. REED, *Mayor.*

As will be seen from a reading of said agreement, the city of Paducah had erected various poles along the streets and alleys of said city, for the purpose of carrying its fire alarm and police service wires, and this agreement was made for the mutual benefit of the city and the telephone company; and, the same has been in force continuously since to the present time, except that the city no longer has any poles, but is using exclusively the poles of the telephone company for carrying its wires used in the fire alarm and police service system, without compensation.

III.

Your orator further states that in June 1887 it was chartered under the laws of the Commonwealth of Kentucky and the business proposed to be transacted was:

"Erecting, maintaining and operating telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems."

9 And on November 16, 1887, purchased from the East Tennessee Telephone Company of New York, all the properties, rights, franchises and privileges connected with the exchange in the city of Paducah, and in the County of McCracken, Kentucky, together with various other properties and rights, not necessary to be here mentioned; and, after paying for the same, took possession and has continuously, ever since that date to the present time, owned, possessed, controlled and operated said exchange in the city of Paducah, County of McCracken, Kentucky; and, has dealt with the city of Paducah and has been dealt with by said city as the

owner of said property. And it has in all respects complied with and abided by and performed all of the terms and conditions imposed by said city upon its predecessor, the New York corporation.

The exchange in said city and county has continued to grow; additional poles have been set from time to time and additional wires strung thereon, as the necessities of the patrons to said exchanges demanded and required; and, at the present time, said exchange has 2611 subscribers. At all times the city of Paducah has recognized the right of your orator to conduct a telephone business in said city. It has from time to time imposed taxes upon said company and collected the same; has directed the location of its poles and wires and has induced said company from time to time to expend large sums of money in extending, improving and repairing said exchange, and has at all times since 1887 obtained telephone service from said exchange, free of charge, for the official business of said city; and, has in other ways recognized your orator as being lawfully upon said streets and as having a right to remain thereon in the conduct of its business.

IV.

In December, 1903, the city of Paducah, through its Legislative Council, adopted an ordinance imposing not only a privilege tax of \$100. per annum upon telephone exchanges; but, in addition to this, a tax of \$1.00 per pole located in said city, the poles at that time amounting to about 1,500. Your orator declined to pay said tax of \$1.00 per pole and thereupon, in May, 1904, suit was instituted by said city to recover the same; and while the same was pending, a settlement of all matters in dispute between the city and your orator was had, by a joint resolution, properly adopted in August, 1904, by the General Council of the City of Paducah and approved by the Mayor, which resolution is as follows:

"Whereas, controversies have arisen and now exist between the City of Paducah on the one hand, and the East Tennessee Telephone Company on the other, with respect to taxes, pole rentals, and various other matters; and,

"Whereas, litigation is pending between the parties with reference to the matters in dispute; and,

"Whereas, it is desired by both parties that all matters of controversy between them be settled and adjusted on an amicable and satisfactory basis;

"Be it resolved by the General Council of the city of Paducah: That all matters in controversy between the East Tennessee Telephone Company and the City of Paducah relative to Franchise, taxes, pole rentals and other matters, be, and the same are hereby settled upon the following terms:

"The East Tennessee Telephone Company having agreed to pay to the city of Paducah the sum of Three Thousand Dollars in cash, and to purchase a franchise from the City of Paducah, which franchise is to be properly enacted into an ordinance, advertised and sold according to the Constitution and laws of the State of Kentucky, and the City is willing to accept said settlement and receive said money in full settlement and discharge of all penalties, pole rentals and

other matters in dispute, up to and including the present year, excepting the present ad valorem tax for the present year which is not yet due, and which has not been paid, will be paid by the East Tennessee Telephone Company when same becomes due, and with the exception of said ad valorem tax, all matters affecting the interests of said company with the city are hereby settled and ended.

"Be it further resolved: That upon the East Tennessee Telephone Company dismissing its present litigation against the city the City Attorney is hereby authorized and directed to request the Attorney General of Kentucky to dismiss all litigation instituted by the Commonwealth of Kentucky against the East Tennessee Telephone Company, no penalties or fines to be imposed.

As a part of said settlement, your orator agreed to pay to the City of Paducah the sum of Three Thousand Dollars, which it did pay, and the said sum was put into the Treasury of said City.

11 Your orator also agreed to purchase a franchise or right to conduct a telephone exchange in said city of Paducah, which form of franchise was fully agreed upon, and is in the words and figures, as follows, to-wit:

"An Ordinance Creating and Providing for the Sale of a Franchise or Privilege to Establish, Maintain and Operate a Telephone System in the City of Paducah.

"Be it ordained by the General Council of the city of Paducah, Kentucky:

"SECTION 1. That there is hereby established and created a telephone franchise for the period of twenty (20) years from the date the sale of same is ratified, granting the privilege or right to construct, establish, maintain and operate a telephone system for public and private use in the city of Paducah, Kentucky, including necessary conduits, sub-ways, man-holes, poles, wires and other equipments, with right of way over, under, along and through the streets, avenues, alleys, squares, bridges and public places in said City for the purpose of running such sub-ways, poles, wires and other equipments necessary to construct, maintain, establish and operate a telephone system in the city of Paducah in accordance with the conditions, terms and limitations of this ordinance; and the purchaser thereof is hereby authorized to construct, own and operate said sub-ways, man-holes, poles, wires and other equipments, and construct, maintain and operate said system.

"SECTION 2. The maximum prices authorized to be charged by the purchaser thereof, or its successors or assigns, for telephones, shall be as follows: For the first three thousand stations or less within the City of Paducah, Kentucky, four Dollars (\$4.00) per month for a business telephone and two dollars and fifty cents (\$2.50) per month for a residence telephone and thereafter fifty cents additional per month for each one thousand additional stations or fractional portion thereof, for business telephones and twenty five cents per month for a residence telephone.

"SECTION 3. The purchaser of said franchise or privilege shall furnish to the city of Paducah twelve (12) telephones free of charge

of similar type and equipment as that furnished its patrons in the said city; said telephones to be placed at such places as may be directed by the city officials.

"SECTION 4. The city of Paducah shall have the privilege of erecting and maintaining its poles and fire alarm wires on the poles of the purchaser of this franchise, but the same shall be erected and maintained in such a manner as not to interfere with the wires and cables of the said purchaser.

12

"SECTION 5. That the poles used by the purchaser of this franchise or privilege shall be reasonably straight, set uniformly, and the work in setting poles shall be under the direction of the Board of Public Works of the city; and all fixtures placed thereon shall be safe and erected in a substantial manner, and shall be as neat in appearance as may be reasonably possible.

"SECTION 6. The purchaser of this franchise or privilege hereby agrees to protect the city of Paducah against any loss or any damage to any person or property in consequence of any act of omission of said purchaser, during the construction, maintenance and operation of said telephone plant.

"SECTION 7. That the purchaser of this franchise or privilege shall have the right to sell or transfer the same; but the same shall not be sold to any existing company now or hereafter operating in the city of Paducah, without the consent of the General Council.

"SECTION 8. The purchaser or purchasers of this franchise or privilege, or its successors or assigns, hereby agree to comply with all the rules, regulations, ordinances and laws of the City of Paducah, Kentucky, now in force or that may hereafter be enacted, for the regulation, government, management, controlling, constructing, establishing, maintaining, or operating a telephone system for public and private use in the city of Paducah, Kentucky, which is to include all necessary conduits, sub-ways, man-holes, poles, wires and other equipments necessary for the successful maintenance and operation of said telephone system and also all rules, regulations, laws, and ordinances of the city of Paducah, Kentucky, that are now in force or that may hereafter be enacted affecting the right or way over, under, along and through the streets, avenues, alleys, squares, bridges and public places in said City for the purpose of running subways, poles, wires and other equipments necessary to construct, maintain, establish and operate said telephone system in said City of Paducah.

"SECTION 9. That the purchaser of this franchise or privilege shall pay the expenses incurred in publishing and advertising this ordinance, and the sale to be held thereunder, and the bid of no person, firm or corporation will be entertained or accepted which had not, prior to the making of said bid, deposited with the Mayor of the City of Paducah, either cash or certified check for the sum of One Hundred Dollars (\$100.00) to be forfeited in the event the purchaser declines to comply with the terms of said sale within five days after the ratification of same by the General Council.

"SECTION 10. The purchaser of this franchise or privilege, its successors or successors in ownership, is guaranteed that during the existence thereof no occupation or license shall be imposed upon the

owner of the same, in excess of one hundred dollars (\$100.00) per annum. This ordinance shall not release any franchise or ad valorem tax.

"SECTION 11. Upon the passage and publication of this ordinance, the Mayor is hereby authorized and directed to advertise this franchise or privilege for sale in the official newspapers of the City of Paducah, stating the time and place, and offer for sale this franchise or privilege, and sell same to the highest and best bidder, reporting his actions to the next meeting of the General Council."

13 Your orator made this settlement, and agreed to take this franchise, in order that it might conduct its business in said city in harmony with the city officials and for the purpose of being permitted to peacefully enjoy its property, it was willing to surrender the rights it then had, in order to obtain the new rights, although of much less value to your orator. It did not owe the Three Thousand Dollars, and only paid it in order that it might have peace and peacefully conduct its business in said City and give its patrons telephone service.

V.

The city of Paducah, through its legally constituted authorities, declined to carry into effect the said agreement; declined to refund the three thousand dollars; but, in June, 1905, adopted another ordinance, providing for the sale of a franchise as required by the Constitution and Statutes of the Commonwealth of Kentucky, differing from the agreement and form of ordinance above set out, in the following particulars, principally: The maximum rates authorized to be charged for telephone service in the city of Paducah was not to exceed \$2.50 for business houses and \$1.50 for residences, and section 12 of said ordinance adopted, provided:

"This ordinance shall not be construed as in any way impairing or repealing the right of the city to impose a tax on the poles of the purchaser, enacted for protection and not for revenue."

Said franchise created under said ordinance was offered for sale, and your orator declined to buy the same, as it was in violation of the agreement made with said city and was so burdensome that it would have destroyed the value of your orator's property in said city in that the rates prescribed were less than the costs of giving the service, and not only left no profit, but would entail an expense upon your orator each and every day it operated an exchange thereunder.

14 VI.

Thereupon, in October, 1905, the defendant filed a petition in the circuit court of McCracken County, against your orator, seeking to compel your orator to vacate the streets and alleys of said city, and for the purpose of preventing your orator from conducting a telephone business in said city. Said petition was filed without the consent, and after the refusal of the attorney-General of the Commonwealth of Kentucky to permit the same to be instituted in his name, or with his concurrence or consent; and, upon a demurrer being in-

terposed, said petition was dismissed. Thereupon on about October 12, 1905, your orator was served with a notice from the Board of Public Works, in the following language:

"East Tennessee Telephone Co., City.

"DEAR SIR: Owing to the fact that the City of Paducah does not recognize you as doing a telephone business in the City of Paducah, by or under authority of law or any franchise, or grant of said city, and contending that you are doing such business in violation of her rights and of law, you are hereby respectfully notified that you must not attempt to place any poles, wires, conduits or make any excavations in the streets or pavements of the city, except the removal of your poles and wires on Kentucky Avenue and Jefferson Streets, where the said poles or wires interfere with the improvements now under course of construction or porposed to be constructed by ordinance providing therefor, and unless otherwise permitted and ordered by this Board, and the City Engineer.

Yours respectfully,

BOARD OF PUBLIC WORKS OF PADUCAH,
KY.,

By ED P. NOBLE, *President*,

By S. A. FOWLER, *Sec'y.*"

This notice was intended to prevent your orator from conducting its business in said city and was intended to deprive your orator of its right to erect poles and string wires in said city; and, recognizing the fact that said Board of Public Works had no authority or power

to issue any such order, your orator declined to observe or
15 comply therewith. And, thereupon, in December, 1905, the

General Council of said city, being the regular and legally constituted legislative body of said city, introduced and duly adopted, the following resolution, to-wit:

"Be it resolved by the Common Council of the City of Paducah that the East Tennessee Telephone Company is now doing business in the City of Paducah without license and without authority of law, and be it further resolved that the Board of Public Works be, and is hereby, directed to issue to said East Tennessee Telephone Company no permits to use the streets of Paducah, Kentucky, for any purpose until said company shall first obtain a franchise to do business in said city of Paducah."

The same was duly approved by the Mayor of said City and became a legally enacted resolution of the legislative board of said City, and was approved by the Mayor of said City on December 23, 1905.

VI.

Your orator further states that the exchange in the City of Paducah is constructed by erecting at a central point in said city a building, in which is located a switchboard, and from this board lines of small wire are carried upon poles and underground to the business house or residence of each subscriber and there connecting with the telephone instrument; in this way, each subscriber can

signal an operator at the central station and receive connection with any other subscriber to the exchange. For this character of service a monthly rental is paid, which entitles the subscribers to receive unlimited service, at any time during the day or night. In the same manner access is given to the toll lines owned by this company and other companies, with whom contracts have been made, by which a subscriber to the local exchange in the city of Paducah can immediately be connected with and talk to any subscriber located in practically every city or town east of the Rocky Mountains; and, patrons to the local exchange at Paducah are not required to pay any additional tolls or charges beyond that paid by persons using the toll lines exclusively from the central office or station.

16 A telephone plant is unlike any other public service utility, in that it is necessary that the plant continue to grow and be enlarged as new patrons are acquired. It is never a finished plant. It is necessary whenever new subscribers are secured to connect such new subscribers by running wires from the switchboard to their places of business or residences to serve them and it is necessary in order to continue to hold the patronage already obtained to constantly increase the number of wires and erect new poles in order to supply telephone service to the new patrons and connect them with the old patrons. And to prevent the stringing of additional wires or the erection of additional poles will destroy the use of the existing poles and wires and prevent your orator continuing its business.

Your orator has made arrangements with various other companies to connect its subscribers to the Paducah exchange with lines, over which telephone messages and telegrams may be sent and received to and from every town east of the Rocky Mountains. The wholesale interests of the city of Paducah, by means of the facilities owned by your orator, and contracts made with existing companies, for their benefit, are in direct and immediate touch with every town and hamlet in which business is transacted with the wholesale interests of the City of Paducah.

Your orator further states that the construction of a telephone plant is such that it cannot be taken down and removed to another place and be again erected. The cost of so doing would exceed the value of that part of the plant which could be used at some other plant. The removal of this plant in Paducah would entail upon your orator great expense and irreparable injury and also a very large sum in the destruction of its business which has been

17 built up through a period of more than twenty-five years, and your orator further states that the action of the Legislative Council of the City of Paducah, in declining to permit it to erect new poles and string new wires will, of necessity, work a destruction of the existing poles and wires, and the other telephone apparatus connected therewith, including the expensive switchboard, which was constructed and erected exclusive for use in the City of Paducah.

VII.

Your orator further states that it has permitted the city of Paducah to use its poles, free of charge, for its police and fire alarm wires;

it has paid all taxes legally and lawfully assessed against it to the city of Paducah; it has from time to time furnished the city of Paducah with free telephone service for the official business of the city of Paducah; it has been required to and has, at great expense, constructed underground ducts and conduits, within which to place its wires and cables; and, it has, in all respects, fully complied with the laws, met all reasonable demands of the city, and has at all times been recognized by the city officials of the city of Paducah as legally and lawfully upon the streets of the city; and, has been induced, in reliance upon said rights, to expend large sums of money in constructing, adding to and extending its said telephone plant in said city. And your orator states that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of Five Thousand dollars.

VIII.

Your orator further states that the action of the Legislative Council of the city of Paducah, in prohibiting your orator from stringing additional wires or erecting additional poles, deprives your orator of its property, without due process of law, and violates the obligation of the contract with your orator, and violates the fourteenth amendment of the Constitution of the United States, which provides:

18 "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

And also section 10 of Article 2, which provides, among other things:

"That no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

Your orator charges that it has a lawful contract with the city of Paducah entitling it to maintain a telephone exchange in the city of Paducah, and that the action of the Legislative Council in undertaking to prohibit your orator from erecting additional poles and stringing additional wires, owing to the inherent nature of the telephone business, does impair the obligation of said contract and violates the Constitution of the United States and also the Constitution of the State of Kentucky.

Your Orator further charges that the action of the officials of the city of Paducah, for the past twenty-five years in recognizing your orator as having a valid and legal contract to construct and maintain a telephone exchange in the city of Paducah, and inducing your orator to expend large sums of money from time to time in the enlargement and extension of said telephone system, and knowing that your orator was relying thereon, estopps said city from now denying the rights of your orator and the action of the Legislative Council, in undertaking to deprive your orator of said rights which it has in said city, deprives it of its property without due process of law and denies to it the protection of the law, in violation of the constitution of the United States.

IX.

Forasmuch as your orator can have no adequate relief except in this court, and to the end therefore, that the defendant, if it can, show why your orator should not have the relief hereby prayed for, and make answer to the matters hereinbefore stated and charged, your orator prays that your Honors grant unto it a writ of subpoena of the United States of America, directed to the city of Paducah, Kentucky, commanding it on a certain day to appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

And your orator further prays that a provisional or preliminary injunction be issued, restraining the defendant from any interference with the property of your orator, in interfering with its business in the city Paducah, Kentucky, and that it be restrained and enjoined from preventing your orator from erecting additional poles and stringing additional wires in the streets, alleys and public places of said city; or from taking any action or interfering in any manner with the right of your orator to operate its telephone exchange in said city; or from in any manner interfering with or disturbing its vested rights; or from in any manner interfering with or seeking to impair the obligation of said contract, and from depriving your orator of its property without due process of law.

And your orator further prays that its right to conduct a telephone business in the city of Paducah be declared and sustained; that its rights procured from the city of Paducah to maintain its poles and wires and apparatus in the streets and alleys be declared and adjudged a valid and substantial contract and that the action of the Legislative Council of said city in undertaking to deprive your orator thereof, be declared and adjudged, illegal and void.

and that the preliminary or provisional injunction be made perpetual.

And your orator prays for such other, further and general relief as may to equity and good conscience belong.

EAST TENNESSEE TELEPHONE COMPANY.

[SEAL.]

By JAMES E. CALDWELL, *President*.
WHEELER, HUGHES & BERRY.*Solicitors.*WM. L. GRANBERRY, *Counsel*.

STATE OF TENNESSEE.

County of Davidson, ss:

Personally appeared before me, the undersigned, James E. Caldwell, and made oath in due form of law that he is the President of the East Tennessee Telephone Company, the plaintiff in the foregoing bill; that he has read the same, and that the statements therein

made, as of his own knowledge, are true, and those made upon information, he believes to be true.

JAMES E. CALDWELL.

Sworn to and subscribed before me this, the 26th day of December, 1905.

[SEAL.]

J. C. SYMMES,
Notary Public.

Filed Dec. 28, 1905.

Process and copy issued.

J. R. PURYEAR, Clerk,

By L. P. PALMER, D. C.

21

Summons.

The United States of America to the Marshal of the Western Kentucky District, Greeting:

You are hereby commanded to summon City of Paducah, Kentucky, to appear before our Circuit Court of the United States of America for the Western District of Kentucky, at the Federal Court Hall, in the City of Paducah, on the first Monday of February next to answer a Bill in Equity exhibited against it in our said Court by East Tennessee Telephone Company and this you shall in no wise omit, under penalty of Four Hundred Dollars and have then there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the Seal of our said Court to be hereunto affixed, at the Clerk's office of said Court in Paducah, this 28 day of December A. D. 1905, and in the 130th year of our Independence.

Attest:

J. R. PURYEAR,

C. C. C., W. K. D.,

By L. P. PALMER, Deputy.

NOTE.—The Defendant will enter its appearance in the U. S. Clerk's Office in Paducah, Ky., on or before the 5th day of February 1905, otherwise the bill may be taken pro confesso.

J. R. PURYEAR, Clerk,

By L. P. PALMER, D. C.

Return.

Received this process by mail from Marshal's office at Louisville and received at Paducah, Ky., Jan. 6th, 1906. Executed same by handing Hon. D. A. Yeiser, Mayor of City of Paducah, a true copy in the City Hall in the City of Paducah, McCracken Co., Ky., Jan. 8th, 1906.

G. W. LONG,

U. S. Marshal, W. D. of Ky.,

By GEO. W. SAUNDERS, D. M.

Marshal's cost \$2.00.

22 In the United States Circuit Court for the Western District of
 Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

Notice.

The City of Paducah by and through its proper officers, will please take notice that on Saturday, December 30, 1905, the plaintiff, East Tennessee Telephone Company, will apply to the Hon. Walter Evans, Judge of the United States Circuit Court for the Western District of Kentucky, at his office in the United States Court House in the City of Louisville, Kentucky, at 10:00 o'clock A. M. for a temporary order restraining the City of Paducah from interfering in any way with the business of the plaintiff, East Tennessee Telephone Company; and will at said place and time move the said Court and the Judge thereof to order the defendant, City of Paducah, not to interfere with the said Company, plaintiff, and complainant, in the maintenance, improvement, extensions and repairs of its property, pole lines, switches, cables and wires until the further orders of this Court; and of this the defendant, City of Paducah, will take due notice.

This December 29th, 1905.

EAST TENNESSEE TELEPHONE COM-
PANY,
By WHEELER, HUGHES & BERRY, Att'ys.

Return.

Executed on the City of Paducah by delivering a true copy hereof
to D. A. Yeiser, Mayor of the City of Paducah, Ky., this December
29th, 1905.

L. D. POTTER, *S. Mc — Co.*,
By H. F. LYON, *D. S.*

Filed December 30, 1905.

J. R. PURYEAR, *Clerk.*

23 United States Circuit Court, Western District of Kentucky, at
Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
vs.
CITY OF PADUCAH, KY., Defendant.

Order.

The complainant this day came by Wheeler, Hughes & Berry, its counsel, and the defendant by Messrs. Campbell & Campbell, its

counsel, and the complainant filed a notice to the defendant herein, and pursuant thereto moved the court to grant and issue a temporary restraining order against the said city of Paducah pursuant to the prayer of the bill of complaint. The defendant not being now ready to proceed with the hearing of said motion, the same was set for hearing at Louisville, Ky., at 10 o'clock A. M., on Saturday, January 6th, 1906, the defendant, through its counsel pledging the court that no steps should in the meantime be taken by the defendant or at its instigation which would be injurious to the interests of the complainant.

Dec. 30, 1905.

WALTER EVANS, *Judge.*

24

Affidavit of D. A. Yeiser.

STATE OF KENTUCKY,
County of McCracken:

The affiant, D. A. Yeiser, says that he is the Mayor of the city of Paducah, Ky., and has been such for several years last past; that he has had an occasion to and has examined the proceedings of the General Council, consisting of the Board of Councilmen and the Board of Aldermen, of said city, thoroughly for the purpose of ascertaining if the East Tennessee Telephone Company at any time ever became the owner by purchase or otherwise of any franchise from the City of Paducah, Ky. to carry on a telephone business in the City of Paducah, and he says that in his search he failed to find any record in any proceeding of either Board of any such franchise ever being sold or transferred to said East Tennessee Telephone Company by anyone or by the City of Paducah, Ky., and so far as he is able to ascertain said East Tennessee Telephone Company is not now operating its plant in the City of Paducah under or by virtue of any franchise granted by the City of Paducah, Ky.

D. A. YEISER, *Mayor.*

Sworn and subscribed to before me by D. A. Yeiser, Mayor of the City of Paducah, Ky., this 29th of Dec., 1905.

D. L. SAUNDERS,
Judge of the Paducah Police Court.

Filed January 4, 1906.

25

March 18, 1895.

Page 500.

East Tennessee Telephone Company.

Councilman Rigglesberger, had read an Ordinance granting Franchise to East Tennessee Telephone Company, second reading Councilman Young moved to add clause fixing the rate that said Company should not charge exceeding \$2.50 per month, for business

houses and \$1.50 per month to private residences, during the existence of this Franchise within the present prescribed limits of Paducah,—Amendment Adopted—. Same moved to strike out the word "City" in section 8 and insert the word "Police" so as to read Police Court of Paducah—Adopted. Owing to the amendments *the adopted* place the ordinance back to its first reading, and being placed upon its first passage was adopted upon a call of the yeas and naves by the following votes.

Yeas: Baker, Clark, Ellis, Elliott, Ezell, Henneberger, Jones, Orm, Rigglesberger, Terrell and Young.

March 20th, 1895.

Page 503.

East Tennessee Telephone Company.

The Clerk read franchise ordinance to East Tennessee Telephone Company, 2d reading and being placed upon its final passage was adopted upon a call of the yeas and nays by the following vote:

Yeas: Clark, Ellis, Elliott, Ezell, Henneberger, Jones, Orm, Reed and Young.

26 April 3rd, 1895.

Page 511.

East Tennessee Telephone Company.

Clerk read ordinance granting — to East Tennessee Telephone Company. 2nd reading and being placed on its final passage was adopted upon a call of the yeas and nays by the following vote:

Yeas: Baker, Clark, Ezell, Henneberger, Orm, Reed, Terrell and Young.

June 3rd, 1895.

Page 536.

East Tennessee Telephone Company.

Councilman — moved the ordinance committee bring in an ordinance allowing the Telephone Company 30 days to accept the terms of the ordinance of agreement with said Telephone Company, motion adopted.

July 1st. 1895.

Page 543.

East Tennessee Telephone Company.

Same had read an ordinance granting 30 days additional time to the East Tennessee Telephone Company, to accept franchise ordi-

nance. 1st reading and being placed upon its first passage. Was adopted upon a call of the Yeas and Nays by the following vote:

Yeas: Baker, Clark, Kreutzer, Elliott, Jones, Orm, Reed, Rigglesberger, Terrell and Young—10.

Nays: Ezell.

27

July 15th, 1895.

Page 550.

East Tennessee Telephone Company.

Same had read an ordinance granting East Tennessee Telephone Company, time to accept former ordinance: second reading and being placed upon its final passage; was adopted upon a call of the Yeas and Nays by the following votes:

Yeas: Baker, Clark, Kreutzer, Elliott, Henneberger, Jones, Orm, Reed, Rigglesberger, Terrell and Young—11.

Nays: Ezell—1.

Sept. 16th, 1895.

Page 577.

East Tennessee Telephone Company.

Councilman Elliott called attention that the East Tennessee Telephone Company, has let time expire and *had* failed to accept the franchise ordinance granting them certain privileges.

Sept. 23rd, 1895.

Page 579.

East Tennessee Telephone Company.

Councilman Young moved the ordinance granting franchise to the East Tennessee Telephone Company be filed away without recording same, as *they were and* null and void. Motion adopted.

28

The affiant, Henry Bailey, says he is City Clerk of the city of Paducah, Kentucky, that as such he has the legal custody and control of the proceedings of the General Council of such City, that he has examined thoroughly the records of the Council proceedings and the above are true copies of all the records he can find pertaining to such Company up to August 3rd, 1904, that he has examined said General Council proceedings and nowhere does it appear that the East Tennessee Telephone Company, became the owner in any way of any franchise from the City of Paducah, nor so far as said records show is said East Tennessee Telephone Company operating its business under any franchise from the City of Paducah.

[SEAL.]

HENRY BAILEY,

City Clerk.

Sworn and subscribed to before me by Henry Bailey this December 29th, 1905.

JAMES CAMPBELL, JR.,
Notary Public, McCracken County, Kentucky.

Filed January 4, 1906.

29 Whereas, the General Council of the City of Paducah has heretofore adopted a resolution, adopted by the Board of Councilmen on the 18th day of December, 1905, and adopted by the Board of Aldermen on the 21st day of December, 1905, directing the Board of Public Works of the City of Paducah not to issue to the East Tennessee Telephone Company any permit to use the streets of Paducah, Kentucky, for any purpose until said East Tennessee Telephone Company shall first obtain a franchise to do business in the City of Paducah, now therefore, for satisfactory reasons,

Be it Resolved: That the General Council by this resolution and these presents doth rescind, revoke and repeal said former resolution and declare same in-operative, null and void.

Adopted by Board of Aldermen, Jan'y 4, 1906.

Adopted by Board of Councilmen, Jan'y 4, 1906.

I, Henry Bailey, City Clerk of the City of Paducah, Kentucky, certify that the above is a true and correct copy of a resolution adopted by the General Council of the city of Paducah, Kentucky, January 4, 1906.

[SEAL.]

HENRY BAILEY,
City Clerk.

Lodged Jan'y 5, 1906, 4 P. M.,
J. R. PURYEAR, *Clerk.*

30 In the United States Circuit Court for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, Defendant.

Affidavit of A. L. Joynes.

The affiant, A. L. Joynes, says that he is and has been for nearly thirteen years the managing agent and chief officer of the complainant, East Tennessee Telephone Company, in the city of Paducah and County of McCracken; that during all of that time the affairs of said Company have been under his immediate supervision and control and that he is thoroughly familiar with the history of the acts and doings of the Telephone Company and the City of Paducah during such period.

He says that there has never been any trouble or controversy between said City and the East Tennessee Telephone Company, with the exception hereinafter noted, until the establishment of an Inde-

pendent Telephone Company in said City about 1903; that prior to that time for years affiant, as agent of the East Tennessee Telephone Company, had been permitted to erect poles and string wires for the Telephone Company without question and without interference upon the part of said City; that from time to time ordinances were adopted regulating the setting of poles, stringing of wires and digging in public streets in said city and this affiant, as agent of said Company, complied with all of said ordinances and was permitted to prosecute the erection of poles, stringing of wires and digging in said streets without interference upon the part of said City or without the right of said Telephone Company being questioned so to do.

31 That taxes, both City, County and State, were annually levied upon said Company and license taxes exacted, all of which were promptly paid by this affiant as agent of said Company to said City, County and State and were received by said City, County and State and no question was raised as to the right of said Company to do business in said City of Paducah until the establishment of said Independent Telephone Company in 1903, as aforesaid; that soon after the establishment of the said Independent Company certain city officials, headed by the Mayor, began to deny to this affiant, as the agent of said East Tennessee Telephone Company, the right to do business in the city of Paducah and to question the authority of affiant as agent of said Company to set up poles and to string wires thereon; that the matter went on without being settled until sometime in 1904 when the Board of Public Works of the City of Paducah, or its agents, acting under instructions from the governing authorities of said City refused to issue to affiant permits to plant its poles in the streets of Paducah or to string wires thereon, although affiant states that he had complied with the ordinances of said City regulating the planting of poles and stringing of wires and regularly and duly applied for permits from said Board of Public Works, as required by the ordinance of said City; and affiant says that the business of the said Company, by reason of said refusal, is and has been ever since said time seriously interfered with and he has been unable to fill the demands of the patrons of said Company for telephones, or to replace wires and poles needing repair or replacement necessary to the public safety of the inhabitants of said City or the proper preservation of said Company; that this state of affairs now exists, and has existed for the last five or six months.

He says that said Company had been denied by the authorities of the City of Paducah the right to erect poles or string wires thereon long before the adoption of the resolution set out in complainant's bill, as adopted by the General Council of said City in December, 1905. He says he has been informed by the officers of the City of Paducah and the authorities having charge of the streets and public places that the said City's denial to him as agent of the said Company to erect poles and string wires is not because *is not because* he has not complied with the ordinance in relation thereto, but because said city authorities deny that said Telephone Company has any franchise in said City or any authority to do business therein.

He says he knows that said Telephone Company has been doing business in the City of Paducah for twenty years and that for thirteen years of said time he has had charge of its affairs; that during said thirteen years it has expended a large amount of money in the erection of poles, wires, telephone apparatus and buildings; that during the time various and sundry ordinances have been passed by the City of Paducah regulating and controlling the erection of poles, stringing of wires and erection of buildings in said City, all of which ordinances have been complied with by affiant's company, and all of the work done by affiant's Company and all of the money expended during said years in said City of Paducah have been known to the authorities of the City of Paducah and assented to and recognized by it under permits issued by said City to said East Tennessee Telephone Company; that immediately after 1903 the taxes for municipal purposes of said Telephone Company were almost thribbled but affiant says that the Company nevertheless paid the same and that since said time the said City has constantly harassed and annoyed this affiant's company by denying it the privileges it has previously recognized, refusing to permit it to successfully carry out the purposes of its organization or to properly supply its patrons with telephone service or to properly safeguard the lives of the citizens of the City of Paducah by the proper erection of poles and stringing of wires and especially has this been the case in the last six months.

He says that the only trouble ever had by the Telephone Company, prior to the establishment of the Independent Telephone Company, now doing business in the City of Paducah, was in 1895, when an effort was made to establish an Independent Telephone Company in said city and during the time said effort was being made the City of Paducah undertook to pass an ordinance to regulate the affairs of affiant's Company and to sell to it a franchise but that said purported ordinance pretending to grant to affiant's Company a franchise was, as affiant is informed, absolutely void as the granting was made direct to the East Tennessee Telephone Company, which affiant is informed and charge — to be — in violation of the Kentucky Constitution and of the law of the State of Kentucky, and that said City, after the passage of the so-called or pretended ordinance, allowed the same to drop and no further proceedings thereunder were demanded by said City and thereafter continued to recognize the right to the East Tennessee Telephone Company to do business in the City of Paducah to permit it to erect its poles and string its wires and put up buildings and supply telephone apparatus and to pay taxes thereon and to pay license fees to the City of Paducah without interference and without question until 1903, as aforesaid.

That since the establishment of the business of said Independent Telephone Company in 1904, the General Council of the City of Paducah ordered affiant's Company to move its poles off of Broadway Street in said City between Fifth and Ninth Streets, which Company did, and said City has all along directed how the poles of said Company shall be placed and how the wires thereon shall be strung and has taken other and further steps which to said Council seemed proper to regulate the business of said Com-

pany in said City, which regulations have been complied with and the right of said City to move the same recognized and obeyed by said Company and at no time has its right to do business in the City of Paducah, or its authority so to do, been questioned except as above set forth.

A. L. JOYNES.

Subscribed and sworn to before me by A. L. Joynes, this 5th day of January, 1906.

BESS SETTLE,

Notary Public, McCracken County, Ky.

Filed January 5th, 1906.

35 United States Circuit Court, Western District of Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, KENTUCKY, Defendant.

Order.

This day came the complainant, the East Tennessee Telephone Company, by its counsel, W. L. Granberry and Wheeler, Hughes & Berry, and came also the defendant by Messrs. Campbell & Campbell, its counsel, and the motion of the complainant for a temporary restraining order and injunction heretofore made herein coming on to be heard, the complainant in support of said motion, read its bill of complaint as an affidavit herein, and also read in the same behalf the affidavit of A. L. Joynes.

The defendants, in opposition to said motion, read as evidence the affidavit of D. A. Yeiser, and also the affidavit of Henry Bailey, with certain exhibits and papers made part of said last named affidavit, and said evidence being heard, the motion was argued by counsel, but the Court not being advised, takes time for its consideration.

WALTER EVANS, *Judge.*

Jan. 6, 1906.

36 Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, Defendant.

Demurrer.

Demurrer of The City of Paducah, the Defendant, to the Bill of Complaint of the East Tennessee Telephone Company, the Plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true

in such manner and form as the same as therein set forth and alleged, and for cause of demurrer shows:

1. That the said Bill of Complaint taken as a whole does not set out and state facts sufficient to constitute a cause of action or complaint against this defendant.

2nd. That the said Bill fails to show that the said plaintiff is the owner by purchase or otherwise of any franchise from the defendant, the City of Paducah, to use the Streets of the City of Paducah for the purpose of carrying on its business.

3rd. That the plaintiff has not in its said Bill, shown any Equity, nor shown any cause as doth or ought to entitle it to any such relief as is thereby sought or prayed for from or against this defendant.

Wherefore, and for divers other good causes for Demurrer appearing in the said Bill, this defendant demurs thereto, and humbly demands the judgment of this Court whether she shall be compelled to make any further or other answer to the said Bill, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

CAMPBELL & CAMPBELL,
Solicitors for Defendant.

37 Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

Verification of Demurrer.

D. A. Yeiser makes solemn oath that he is the Mayor and Chief Officer of the defendant, City of Paducah, and that the Demurrer hereto attached to the Bill of Complaint of the above named plaintiff, is not interposed for delay, and that the same is true in point of fact.

D. A. YEISER, *Mayor.*

Sworn and subscribed to before me by D. A. Yeiser, this 5th day of February, 1906. My commission expires January 10th, 1910.

[SEAL.]

BERTHA LEMING,
Notary Public, McCracken County, Ky.

38 Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

Certificate of Counsel.

We, Campbell & Campbell, the undersigned, do hereby certify that we are Counsel for the defendant, the City of Paducah, in the above

styled cause, and that the Demurrer hereto attached and filed to the Bill of Complaint of the Plaintiff, East Tennessee Telephone Company, is in our opinion well founded in point of law.

CAMPBELL & CAMPBELL,
Counsel for Defendant.

At Rules.

Filed February 5th, 1906.

39 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of
Kentucky. In Equity.

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH, KENTUCKY.

Temporary Restraining Order.

The Court being now sufficiently advised of the motion of the complainant for a Temporary Restraining Order, submitted on the 6th day of January, 1906, is of the opinion that the same should be sustained and it is therefore ordered, adjudged and decreed by the Court that the defendant, the City of Paducah, its officers, officials, servants, agents, attorneys and employees and all persons engaged by, through or under it, be and they are hereby enjoined and restrained from interfering with the property of the plaintiff in said City and from taking any action in any manner interfering with the plaintiff's erecting poles and wires in the streets, alleys and public places in the City of Paducah and from interfering in any manner with the business of the plaintiff in said city; and from taking any action in any manner interfering with, or which will interfere with, the rights claimed by the plaintiff to use and occupy the streets, alleys and public places in the City of Paducah for its poles and wires until the first day of the next November term of this Court, unless otherwise ordered by the Court, and until any motion then made by the complainant for an injunction pendente lite shall be heard and determined by the Court.

WALTER EVANS, *Judge.*

This April 17, 1906.

40 In the Circuit Court of the United States for the Western
District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, Defendant.

Notice.

The plaintiff, East Tennessee Telephone Company by and thru its proper officers, will please take notice that on Tuesday May 15th,

1906, the defendant, the City of Paducah will appear before his Honor, the Honorable Walter Evans, Judge of the United States Circuit Court, for the Western District of Kentucky, at his office in the United States Court House, in Chambers, in the City of Louisville, Kentucky, at 10:00 o'clock A. M., and then and there enter a motion to dissolve the temporary injunction heretofore granted in the above action, and the plaintiff, East Tennessee Telephone Company will take notice of said action.

CITY OF PADUCAH,
By JAMES CAMPBELL, JR.,
City Solicitor.

Paducah, Kentucky, May 11th, 1906.

Return.

Executed May 11, 1906 on the East Tennessee Telephone Company by delivering to A. L. Joynes, Manager of said Company, at Paducah, a copy of the within notice, also on his attorney, Wheeler, Hughes & Berry, by delivering to Henry Hughes, one of the firm, a copy of the within notice.

JNO. W. OGILVIE, S. Mc.,
By GUS ROGERS, D. S.

Filed May 15, 1906.

41 In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

Motion to Dissolve Temporary Injunction.

Comes the defendant, City of Paducah, and respectfully moves the Court to dissolve the temporary injunction granted herein, and files in support of this motion the affidavits of Ed. P. Noble, President of the Board of Public Works of the City of Paducah, L. A. Washington, City Engineer of the City of Paducah, J. O. Keebler, Superintendent of the Electric Light Plant of the City of Paducah, Alex Kirkland, Auditor of the City of Paducah, and James Campbell, Jr., City Solicitor of the City of Paducah, and therein shows cause and reasons for the dissolution of said temporary injunction.

Wherefore, defendant prays that the temporary injunction granted herein be dissolved.

CITY OF PADUCAH,
By JAMES CAMPBELL, JR.,
City Solicitor.

Filed May 15, 1906.

42 In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

Affidavit on Motion to Dissolve Temporary Injunction.

The affiant, J. O. Keebler states he is Superintendent of the City Light Plant, of the City of Paducah. That as such, it is one of his duties to keep an account of the telephone and telegraph poles erected in the City of Paducah, and by whom erected; that he was present at the meeting of the Board of Public Works when the East Tennessee Telephone Company asked permission to erect certain poles in the City of Paducah, and at which time the Board of Public Works refused to take any action upon the request made. That since said time the East Tennessee Telephone Company has erected a number of poles in the City of Paducah without permit or authority from the City, the Board of Public Works or any other authorized officer or Board of said City. That the poles so erected by the East Tennessee Telephone Company, as aforesaid, are for the purpose of extending the telephone lines of said Company, and are not for the purpose of repairing or taking care of the present line system of the City, and that said poles were so erected without designation of place or time, dimension of poles or any other matters in regard thereto by the City of Paducah, or any authorized Board of officer thereof, and that affiant confidently believes that the East Tennessee Telephone Company intends to and will, unless restrained from doing so, continue to erect poles in the City of Paducah, wherever and whenever they get ready, without permit from the City or any authorized officer or Board thereof.

43 That the greater majority of poles to be erected by the East Tennessee Telephone Company as aforesaid, are for the purpose of extending their wires and present system in the City, and not for the purpose of repairing their wires, poles or system.

J. O. Keebler says he is Superintendent of the City Electric Light Plant, of the City of Paducah, and that the statements in the foregoing affidavit are true.

J. O. KEEBLER, *Supt.,*
Superintendent City Light Plant.

Sworn and subscribed to before me by J. O. Keebler, this 12th day of May, 1906. My commission expires Jan'y 10, 1910.

[SEAL.]

BERTHA LEMING,
Notary Public, McCracken County, Kentucky.

Filed May 15, 1906.

44

Affidavit of L. A. Washington.

In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, Defendant.

Affidavit on Motion to Dissolve Temporary Injunction.

The affiant, L. A. Washington, says he is the City Engineer of the City of Paducah, and that as such by ordinance, it is his duty when so instructed by the Board of Public Works, to grant to the person so designated, permission to erect telephone and telegraph poles, and to make excavations in and on the streets of the City of Paducah.

That he was present at the meeting of the Board of Public Works, when the permit to erect poles in the City of Paducah was requested, as set out in the affidavit of Ed. P. Noble, by the East Tennessee Telephone Company, and that upon the refusal of the Board of Public Works to take any action upon the request made by the East Tennessee Telephone Company, he as City Engineer, was not authorized to, nor did he, issue any permit to the said East Tennessee Telephone Company to erect any telephone poles in the streets of the City of Paducah, or make any excavations, nor has he since said date granted any permits to erect any poles or make any excavations to the East Tennessee Telephone Company.

Affiant further states that notwithstanding no permit was granted to the East Tennessee Telephone Company as aforesaid, the East Tennessee Telephone Company has since said date, erected a

45 number of poles at the various points on the streets in the City of Paducah, without permit or authority from me or any other authorized Board of officer of the City of Paducah.

L. A. Washington says that he is City Engineer of the City of Paducah, and that the foregoing statements in this affidavit are true.

L. A. WASHINGTON.

City Engineer, City of Paducah, Kentucky.

Sworn and subscribed to before me by L. A. Washington this 12 day of May, 1906. My commission expires Jan'y 10, 1910.

[SEAL.]

BERTHA LEMING,

Notary Public, McCracken County, Ky.

Filed May 15, 1906.

Affidavit of James Campbell, Jr.

In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

VS.

CITY OF PADUCAH, Defendant.

Affidavit on Motion to Dissolve Temporary Injunction.

The affiant, James Campbell, Jr., says that he is City Solicitor of the City of Paducah. That pursuant to a joint resolution of the General Council, which is filed herewith as part hereof, marked "A," for identification, he applied to the Treasurer of the City of Paducah, and was paid by the Treasurer of the City of Paducah, and gave his receipt therefor to the Auditor and Treasurer, the sum of \$3286.50. That pursuant to said resolution as aforesaid he tendered in legal tender money of the United States on April 26, 1906, to Messrs. Wheeler, Hughes & Berry of the city of Paducah, Counsel for the East Tennessee Telephone Company, and also to Mr. A. L. Joynes, Agt., at the City of Paducah of the East Tennessee Telephone Company, said sum of \$3286.50; that said money and tender aforesaid was not accepted by either the said Wheeler, Hughes & Berry or A. L. Joynes.

That said tender of said money was made as aforesaid, for the purpose of and in good faith by the City of Paducah, to repay to the East Tennessee Telephone Company, or their duly authorized officer or agent, or representative, the sum of \$3000.00 theretofore paid by the East Tennessee Telephone Company to the City of Paducah, on September 23d, 1904, together with interest thereon from said date up to April 26th, 1906, the date said money was so tendered. That

upon the refusal as aforesaid to accept said money the affiant
47 then placed upon special deposit, in the American-German National Bank of the City of Paducah, in legal tender money of the United States, said sum of \$3286.50, and notified in writing, by letter addressed to Mr. J. A. Caldwell, President of the East Tennessee Telephone Company, Nashville, Tennessee, the East Tennessee Telephone Company, that said money was deposited as a continuous tender to said Company, and was subject at any time to the acceptance of said Company, in settlement of said \$3000.00, paid as aforesaid, together with the interest thereon to April 26th, 1906. That said sum of \$3286.50 is now, upon special deposit in the American-German National Bank, of the City of Paducah, and that the affiant as the authorized officer of the City of Paducah stands ready to now, and at all times, pay to said East Tennessee Telephone Company or its duly authorized officer, or agent, said sum as aforesaid, and for the purposes aforesaid.

James Campbell, Jr., says he is City Solicitor of the City of Paducah.

cah, Kentucky, and that the statements in the foregoing affidavit are true.

JAMES CAMPBELL, JR.,
City Solicitor, City of Paducah, Ky.

Sworn and subscribed to before me by James Campbell, Jr., this 12th day of May, 1906. My commission expires January 10th, 1910.

[SEAL.]

BERTHA LEMING,
Notary Public, McCracken Co., Ky.

48 Whereas, during the month of August, 1904, the General Council of the City of Paducah, by joint resolution undertook to adjust the difference then existing between the City of Paducah, Ky., and the East Tennessee Telephone Company, and whereas by the terms of said joint resolution the General Council of the City of Paducah agreed to sell the said East Tennessee Telephone Company a franchise, and the said East Tennessee Telephone Company, agreed to purchase said franchise from the City of Paducah, and whereas said joint resolution by its terms also agreed to settle certain demand for tax the said city had against said telephone company, and in consideration of said settlement of said tax demand, and the agreement to sell said franchise, as aforesaid, the said East Tennessee Telephone Company paid the City of Paducah, the sum of Three Thousand (\$3000.00) Dollars, and whereas since the adoption of said joint resolution, and the receipt of the said sum of Three Thousand (\$3,000) Dollars, the General Council of the City of Paducah, was advised by the City Solicitor and now believes that said joint resolution was contrary to law, and in violation of the constitution of the State of Kentucky, and whereas, the General Council of the City of Paducah cannot lawfully effectuate the term of said joint resolution, and whereas the said City cannot in good conscience and good faith retain the said sum of Three Thousand (\$3,000) Dollars under such condition and whereas no lawful contractual relations were or could be created by said unlawful joint resolution, and whereas, it is the desire of said City of Paducah to leave said Telephone Company in same situation as it was prior to the adoption of said joint resolution, and to preserve all rights of the City against said East Tennessee Telephone Company, as they existed prior to the adoption of said joint resolution.

Now therefore be it resolved by the General Council of the City of Paducah, that the former action of the General Council
 49 in adopting said joint resolution during the month of August, 1904, and said joint resolution be, and the same is hereby repealed, and held for naught.

And be it further resolved that the sum of Three Thousand (\$3,000) Dollars and accrued interest thereon is hereby ordered to be placed in the hands of James Campbell, Jr., City Solicitor, of the City of Paducah, to be by him paid to reimburse for the City of Paducah the said Telephone Company, for the amount paid by it to said City under the terms of the joint resolution above referred to.

L. F. KOLB.

Henry Bailey says that he is City Clerk of the City of Paducah, duly elected and qualified, and as such he is the lawful custodian of all records and proceedings of the General Council of the City of Paducah; that the foregoing resolution is a true and correct copy of a certain resolution duly and regularly passed by the General Council of the City of Paducah during the month of April, 1906.

HENRY BAILEY,
City Clerk.

Sworn and subscribed to before me by Henry Bailey, City Clerk, of the City of Paducah, Kentucky, this the 12th day of May, 1906. My commission expires Jan'y 10th, 1910.

[SEAL.]

BERTHA LEMING,
Notary Public, McC. Co., Ky.

Copy.

Filed May 15, 1906.

50

Affidavit of Ed. Noble.

In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,
vs.

CITY OF PADUCAH, Defendant.

Affidavit on Motion to Dissolve Temporary Injunction.

The affiant, Ed. P. Noble, says that he is President of the Board of Public Works, of the City of Paducah, Kentucky; that by due operation of law the Board of Public Works, and the City of Paducah, has within its control and management and supervision, the streets and public ways of the City of Paducah, and especially the excavations therein, the placing of poles and other obstructions thereon. That the Board of Public Works, for and in behalf of the City has, under course of operation a system of placing poles and stringing of wires thereon on the streets of the City, which is meant to and does materially decrease the number of poles placed upon the streets of the City. That there are now in the City a large number of streets that have a great many poles upon same, used for the purpose of stringing wires by various different persons operating and doing business in the City of Paducah, necessitating the use of poles and wires. That owing to the great number of poles used for such purposes in said City, the appearance and usefulness of the streets of the City are greatly impaired, and the safety of the citizens of Paducah will be endangered and affected, unless the City, thru its Board of Public Works, is permitted to more uniformly control the erection of poles upon the streets of the City.

51 That the City of Paducah, thru its Board of Public Works, has, for a number of months passed, been effectually carrying out this system of uniformity in the erection of poles

upon the streets of the City, and by this method has been able to and has improved the appearance, usefulness and safety of many of the streets of Paducah.

That there are now a great number of poles being erected in the City of Paducah by various different persons doing business in said City, and using telephone or telegraph poles, and unless the Board of Public Works is permitted to control the placing of poles on the streets of Paducah, the work that has been done in the past, in eliminating as many poles as possible from the Streets, and making more uniform the erection of poles thereon, as well as the appearance and safety of the Streets of the City of Paducah, will be greatly impaired, and the City of Paducah will be greatly harmed and put to useless expense in the future, to take care of and provide against the dangers and expenses incident to the erection and maintenance of poles upon the streets of Paducah.

That in addition to the new poles that are now being erected, there are over the City, a great many old un-used and dangerous poles, which need immediate care and attention of the City and the Board of Public Works, in order to preserve the safety and appearance and general welfare of the streets and citizens of Paducah. That some of these poles belong to and are the property of the East Tennessee Telephone Company, and that so long as the temporary injunction granted herein prevails, the Board of Public Works is estopped and prevented from either controlling the erection of new poles by the East Tennessee Telephone Company, upon the Streets of Paducah, or ordering the old useless and dangerous poles belonging to said Company taken from the streets of the City of Paducah.

52 Affiant further says that since the granting of the temporary injunction herein, the East Tennessee Telephone Company has made application to the Board of Public Works for permits to erect poles at certain points upon the streets of the City of Paducah; that the Board, by reason of the injunction granted herein, was prevented from taking any action upon the permit requested, and that since said application was made, as affiant is reliably informed, the East Tennessee Telephone Company has erected and is now erecting without permit or permission of any kind from the Board of Public Works, or any authorized officer or Board of the City of Paducah, telephone poles, and stringing wires thereon, and all of which is done without sanction or approval or permission of the Board of Public Works, the City of Paducah, or any authorized officer of Board thereof.

That the erection of said poles by the East Tennessee Telephone Company as aforesaid, without permit from the Board of Public Works, or the City of Paducah, is objectionable to the City and the Board of Public Works, and interferes with the operation of the business of the Board of Public Works.

E. P. Noble states he is President of the Board of Public Works, and that the foregoing affidavit is true.

ED. P. NOBLE,
President Board of Public Works.

Sworn and subscribed to before me by Ed. P. Noble, this 12 day of May, 1906. My commission expires Jan'y 10, 1910.

BERTHA LEMING,

Notary Public, McCracken Co., Ky.

Filed May 15, 1906.

Affidavit of Alex. Kirkland.

In the Circuit Court of the United States for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, Defendant.

Affidavit on Motion to Dissolve Temporary Injunction.

The affiant, Alexander Kirkland, states he is Auditor of the City of Paducah, duly appointed and qualified. That as such, it is one of his duties to keep the records of the receipts and disbursements of the Treasurer of the City of Paducah;

He states that the East Tennessee Telephone Company, on September 23d, 1904, paid to the City of Paducah, thru its authorized representative, the sum of \$3000.00, in accordance with a certain joint resolution passed by the General Council, endeavoring to compromise certain litigations pending between the East Tennessee Telephone Company and the City of Paducah, at said time, and he states that on April 26th, 1906, in accordance with a resolution of the General Council of the City of Paducah, there was entered upon his claim register, and officially prepared by him, and there was paid by the City Treasurer of the City of Paducah, to James Campbell, Jr., City Solicitor, the sum of \$3286.50. That said sum of \$3286.50 represents and is the sum of \$3000.00 paid as aforesaid on September 23rd, 1904, by the East Tennessee Telephone Company, together with 6% interest thereon from said date up to and including April 26th, 1906.

Alexander Kirkland says the statements in the foregoing
54 affidavit he believes to be true.

ALEXANDER KIRKLAND,

Auditor City of Paducah, Kentucky.

Sworn and subscribed to before me by Alexander Kirkland this 12 day of May, 1906. My commission expires Jan'y 10, 1910.

[SEAL.]

BERTHA LEMING,

Notary Public, McC. Co., Ky.

Filed May 15, 1906.

55

EAST TENNESSEE TELEPHONE CO.

VS.

CITY OF PADUCAH.

Stipulations.

It is agreed herein that after the granting of the restraining order by this Court in this case, the East Tennessee Telephone Company did in due and proper form of law, make proper application to the Board of Public Works of the City of Paducah for a permit to erect certain poles and string certain wires in said City; that this application was made after every legal requirement required by the law and the ordinances, charter, and by-laws of City of Paducah had been complied with by said Telephone Co.; that said Board of Public Works was the proper authority to which to apply for such permit, and that said Board refused to consider said application and still refuses to act upon said application.

EAST TENNESSEE TELEPHONE CO.,

By WHEELER, HUGHES & BERRY.

CITY OF PADUCAH,

By JAMES CAMPBELL, JR.,

City Solicitor.

Filed May 15, 1906.

56 United States Circuit Court, Western District of Kentucky,
at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

VS.

CITY OF PADUCAH, Defendant.

Order.

Upon notice this day filed the defendant moved the Court to dissolve the temporary injunction heretofore made and entered herein, and in support of said motion filed and read the affidavits of Ed. P. Noble, L. A. Washington, J. O. Keebler, Alex. Kirkland and James Campbell, Jr., and the complainant filed and read a stipulation in writing, signed by counsel and covering certain facts; And thereupon said motion coming on to be heard was argued by counsel and the Court being sufficiently advised, overruled said motion, but without prejudice to the right of the defendant at any time to move for further directions respecting the subject matter thereof.

WALTER EVANS, *Judge.*

May 15, 1906.

57 United States Circuit Court, Western District of Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE Co., Complainant,

vs.

CITY OF PADUCAH, Defendant.

Judgment on Demurrer.

The questions of law arising upon the demurrer to the bill of complaint come on to be heard and *was* argued by counsel, and the court being now sufficiently advised, it is ordered, adjudged and decreed by the court that said demurrer be and it is overruled and denied.

The defendant is given leave to answer the bill or otherwise to plead further on or before the August, 1907, rules.

WALTER EVANS, *Judge.*

June 8th, 1907.

58 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western Division of Kentucky.

In Equity.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, KENTUCKY, Defendant.

The Plea of The City of Paducah, Defendant, to the Bill of Complaint of East Tennessee Telephone Co., Plaintiff.

The defendant, City of Paducah, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill.

The said City of Paducah, the above named defendant, specially appearing for purpose of this plea and for no other, says that it has never violated any contract it had with complainant, East Tennessee Telephone Company, or ever passed any resolution, law, or taken any action whatsoever which would impair any obligation of any contract it ever had with the said complainant, nor has it ever deprived or attempted to deprive the complainant of any of its property without due process of law.

Second. For further plea defendant says that since the filing of complainant's bill the City of Paducah, by and through the General Council of the City of Paducah, has adopted a resolution in words and figures as follows:

"Whereas the General Council of the City of Paducah, has heretofore adopted a resolution, adopted by the Board of Councilmen on the 18th day of December, 1905, adopted by the Board of Aldermen on the 21st day of December, 1905, directing the Board of Public Works of the City of Paducah not to issue to the East Tennessee Telephone Company any permit to use the streets of Paducah, Kentucky, for any purpose until said East Tennessee Telephone Company shall first obtain a franchise to do business in the City of Paducah, Kentucky, now, therefore, for satisfactory reasons,

Be it resolved: That the General Council by this resolution and these presents doth rescind, revoke and repeal said former resolution and declare same inoperative, null and void."

Defendant says the above resolution was passed by the General Council of Paducah, Ky., on Jan'y 4, 1906, and has remained in full force and effect ever since said date; that neither before nor since the adoption of said resolution has the defendant ever attempted to take, molest or interfere with any property of the said complainant.

Third. Defendant further avers that since the filing of complainant's bill, to wit on the 26th day of April, 1906, it tendered to the complainant in legal tender of the United States the sum of \$3286.50, and that said money was thereupon refused by complainant, and thereupon the defendant had said sum placed upon special deposit subject to the order of said complainant and same has remained subject to complainant's order ever since said date.

That said sum of \$3286.50 represents \$3000.00 paid by complainant to the defendant on the 23rd day of Sept., 1904, upon an attempted settlement made on said date between said complainant and defendant, together with the interest thereon up to the date of said tender at the rate of six per centum per annum; that defendant is now and always has been ready and willing to pay said \$3000.00 and interest to complainant.

Defendant further avers that the subject matter of complainant's bill therein set out is not within the jurisdiction of this court, and that the cause of complaint alleged by complainant is not one arising under the Constitution or laws of the United States. All which matters and things this defendant doth aver to be true and pleads the said revocation of said resolution complained of in the bill and the tender of said \$3286.50, which defendant now offers and stands ready to pay any time to the complainant, to the said complainant's bill, as a bar to the right of complainant to further prosecute this complainant.

Wherefore, defendant prays the judgment of this Court whether further cognizance of this complaint will be held, and whether this court will hold plea upon and enforce the defendant to answer the bill.

CITY OF PADUCAH,
By D. A. YEISER, Mayor.

HAL S. CORBETT,
JAMES CAMPBELL, Jr.,
Solicitors for Defendant.

STATE OF KENTUCKY,
County of McCracken:

D. A. Yeiser makes solemn oath and says that he is the Mayor of the City of Paducah, defendant, and that the foregoing plea is not interposed for delay and that the same is true in point of facts.

D. A. YEISER.

Sworn and subscribed to before me by D. A. Yeiser, this 20th day of July, 1907. My commission expires the last day of the next Kentucky Senate.

ROSCOE REED,
Notary Public in and for McCracken County, Ky.,

61 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

JAMES CAMPBELL, JR.,
Of Counsel for Defendant.

Filed July 30, 1907.

62 Order.

November 21st, 1907.

In Equity.

EAST TENNESSEE TELEPHONE CO., Plaintiff,
vs.
CITY OF PADUCAH, Defendant.

This cause coming on for argument upon the plea filed July 30, 1907, was argued by counsel and the court being of the opinion that the matters stated in said plea were not matters for a plea but for answer, it is ordered that the said plea be and it is stricken out and the defendant is given time to the — day of January 1908, Rule Day, to file an answer to the bill of complaint.

63 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky. In Equity.

EAST TENNESSEE TELEPHONE COMPANY
vs.
CITY OF PADUCAH.

Answer of the Defendant, the City of Paducah, Kentucky, to the Bill of Complaint of the East Tennessee Telephone Company.

This defendant now and at all times hereafter, saving to itself all manner of benefit or advantage of exception or otherwise that

can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer hereto or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering now says:

It denies that on the 26th day of May, 1880, or at any other date the East Tennessee Telephone Company was duly or at all organized under the laws of the State of New York for the purpose of building telephone and telegraph lines and exchanges, or either thereof from the City of New York by some convenient route or any route through or across the intervening states or any of them to the City of Knoxville or else where in the State of Tennessee or any other State, and thence to the City of Chattanooga in said State or to various points and places or to any points or places wherein the respective limits of said cities, or from Chattanooga or Knoxville by some convenient route or any other route to the cities of Frankfort and Lexington or either of them in the State of Kentucky or to various points or places within or about said cities or either of them or to any other points or places within or throughout

64 the said states of Kentucky and Tennessee or either of them, connecting the said cities or either of them to places within or about the same or including telephone exchanges or any telephone exchanges or district stations, as the plaintiff might desire to establish within the territory or any or the territory mentioned in said bill.

It denies that in order to conduct a telephone business anywhere in the United States or any of them it was necessary to secure a patent right which was at that time or at any other time owned by the corporation organized under the laws of the State of New York and known as the American Bell Telephone Company, and it denies that no person, firm or corporation could conduct a telephone business or telephone apparatus without the permission of the aforesaid American Bell Telephone Company, and it denies that thereupon or at all the East Tennessee Telephone Company procured the exclusive right or any right to conduct a telephone business and use telephone apparatus under said patent rights in the various cities of Kentucky and Tennessee or any of them, or among others, the city of Paducah, Kentucky.

It denies that the license or right to use telephone or telephone apparatus in the City of Paducah, Kentucky or in McCracken County, Kentucky, or in various other counties and cities in the State of Kentucky or Tennessee or either of them was thereupon, or at all purchased or acquired by the East Tennessee Telephone Company for the full life of said patents or any improvements thereon or that same was so purchased or acquired at all.

It denies that the said plaintiff, in the exercise of its rights under said patent did erect various exchanges in the States of Tennessee and Kentucky or elsewhere, or did under said right, or any

65 right, erect a telephone exchange in the city of Paducah, Kentucky, or in the County of McCracken, and it denies that these various exchanges or any of them, were connected together by poles, lines and telegraph circuits, affording easy or rapid inter-

communication between patrons located in various cities in said two states or either of them.

It denies that on November 1, 1880, or at any other time, the following communication was caused to be addressed to the Mayor and City Council of the City of Paducah, Kentucky, by the East Tennessee Telephone Company, to wit:

"To his Honor, Mayor and City Council of the City of Paducah, Kentucky:

We, the subscribers, humbly petition your honorable body for permission to erect poles and hang wires thereon throughout your city for the purpose of establishing a telephone exchange for the convenience of your citizens. Trusting that your honorable body will grant our petition, we are

Respectfully, BELL TELEPHONE COMPANY."

(Referred to street, W. G. Washburn, Agent, Committee.)

It admits that on November 15, 1880, the following appears of record upon the proceedings of the Mayor and City Council of the said City.

"To the Honorable Mayor and City Council of Paducah.

GENTLEMEN: We, your committee, to whom was referred the petition of W. G. Washburn, agent of the Bell Telephone Company in the matter of erecting telephone poles throughout the City, would respectfully recommend that said prayer be granted on the following conditions, viz: the poles not to be less than thirty-five feet in height and ten inches in diameter at the base, and good proportion all the way up to the top, to be painted red at the base, and white from the red to the top of the pole.

E. J. HALLAN,

W. E. AUGUSTUS, *Committee*.

On motion the report was received, recommended and concurred in."

It denies that in pursuance of said authority, or any authority obtained for the East Tennessee Telephone Company through its agent and representative, W. G. Washburn or by any authority whatsoever, the East Tennessee Telephone Company, proceeded at

once or at all to erect a telephone Exchange in the City of Paducah; and it denies that on June 1, 1881, the complainant had fifty subscribers to said Exchange, or that from time to time additional poles were erected, additional wires strung thereon as the number of subscribers increased until 1887; and it denies that in 1887 the number of subscribers to said exchange had increased to ninety-two.

It denies that many poles had been erected or that much additional wire strung to serve the patrons to that exchange.

It denies that on the first day of April 1887, or at any other time or at all, an agreement was entered into between the City of

Paducah and the East Tennessee Telephone Company with reference to the paint, use of poles belonging to the City, and the Telephone Company. And it denies that any such agreement made by it and this Complainant was or is in the words and figures or any of them as alleged in Complainant's bill.

It admits that the City of Paducah had erected various poles along the streets and alleys of said city for the purpose of carrying its fire alarm and police service wires, but it denies that this pretended agreement between complainant and this defendant was made for the mutual benefit of the City and the Telephone Company, or that the same has been in force continuously to the present time or at all. And it denies that the City no longer has any poles, or that it is using exclusively or otherwise the poles of the Telephone Company for carrying its wires used in its fire alarm and police service system without compensation.

It denies that in June, 1887, or at any other time or at all the complainant herein was chartered under the laws of the Commonwealth of Kentucky, or that the business proposed to be transacted was "erecting, maintaining and operating telephone and telegraph lines, telephone exchanges and all such business
67 as is usually done by telephone exchanges and district telegraph and messenger systems".

It denies that on November 16th, 1887, or at any other time or at all, complainant purchased from the East Tennessee Telephone Company of New York all the properties, rights, franchises and privileges, or any of them connected with the exchange in the City of Paducah and the County of McCracken, Kentucky, together with various or any other properties and rights; and it denies that after paying for same, or any part thereof complainant took possession and has continuously ever since that date to the present time, owned, possessed, controlled and operated said exchange in the City of Paducah, County of McCracken, Kentucky, or that complainant has dealt with the City of Paducah or has been dealt with by said City as the owner of said property or that it has in all respects complied with and abided by and performed all or any of the terms and conditions imposed by the said City upon complainant's alleged predecessor, the New York corporation.

It admits that the exchange in said City and County has continued to grow and that additional poles have been set from time to time and additional wires strung thereon, and that said exchange has 2611 subscribers as set out in complainant's bill.

It denies that at all times or at all, the City of Paducah has recognized the right of Complainant to conduct a telephone business in said City, or that it has from time to time or at all imposed taxes upon said Company or collected the same or directed the location of its poles and wires or either or any of them. It denies that it has induced said Company from time to time or at all to expend large sums of money, or any sum of money in extending, improving or repairing said exchange, or that it has at all times since
1887, or at all, obtained telephone service from said exchange

68 free of charge for the official business of said City, or otherwise, and it denies that it has in other ways or at all recog-

nized complainants as being lawfully upon streets or any of them, or as having a right to remain thereon in the conduct of its business or otherwise.

It admits that in December 1903, the City of Paducah through its Legislative Council adopted the ordinance mentioned in Complainant's Bill imposing a privilege tax of One Hundred (\$100) Dollars per annum upon telephone exchanges and also a tax of one (\$1) Dollar per pole located in said City, the poles at that time amounting to about Fifteen Hundred (\$1500) Dollars, and that the complainant herein declined to pay said tax of One (\$1) Dollar per pole and that in May of 1904, suit was instituted by said City to recover the same, but it denies that while said suit was pending, a settlement of all matters in dispute between the City and this complainant was had by a joint resolution properly adopted in August, 1904, or at any other time by the General Council of the City of Paducah or approved by the Mayor.

It admits that in August, 1904, the General Council of the City of Paducah undertook to adopt, and the Mayor did approve the pretended paint resolution set out in complainant's bill, and that said pretended paint resolution was in words and figures as fully set forth in complainant's bill.

It admits that as a part of said pretended settlement this complainant agreed to and did pay the said City the sum of three thousand (\$3,000) Dollars and that said sum was put into the Treasury of said City.

It admits that complainant also agreed to purchase a franchise or right to conduct a telephone exchange in said City of Paducah, which form of franchise was fully agreed upon, and that said form of franchise is in words and figures as fully set forth in complainant's bill.

69 It denies that Complainant made this settlement and agreed to take this franchise in order that it might conduct its business in said City in harmony with the officials or for the purpose of being permitted to peacefully enjoy its property, it was willing to surrender any rights in order to obtain the new rights, or that same were of much less or of any value to it.

It denies that Complainant did not owe the Three Thousand (\$3,000) Dollars, or that it paid same in order that it might have peace and peacefully conduct its business in said City, or give its patrons telephone service. It admits that the City of Paducah, through its legally constituted authorities, declined to carry into effect the said agreement, but denies that it declined to refund the said Three Thousand (\$3,000) Dollars.

It admits that in June, 1905, the City, through its legally constituted authorities, did adopt another ordinance providing for the sale of a franchise as required by the Constitution and Statutes of the Commonwealth of Kentucky, differing from the said agreement and form of ordinance set forth in Complainant's bill as hereafter referred to in the form and manner as set forth in complainant's bill.

It admits that said franchise, created under said ordinance was

offered for sale and that complainant declined to buy the same or to bid on same, but it denies that it was in violation of any valid agreement made with the said City by Complainant, or that it was so burdensome that it would have destroyed that value of complainant's property in said City, or that the rates prescribed were less than the costs of giving the service or that said rates left no profit or would entail an expense upon complainant each and every day it operated an exchange thereunder.

It admits that in October, 1905, it filed a petition in the Circuit Court of McCracken County against this complainant as set forth in complainant's bill, but denies that said petition was dismissed as set forth in complainant's bill or at all and it admits that thereupon, on or about October 12th, 1905, this complainant was served with a notice from the Board of Public Works in the language set forth in Complainant's bill.

It denies that this notice was intended to prevent this complainant from conducting its business in said City, or was intended to deprive Complainant of its rights to erect poles and string wires in said City. It admits that this Complainant declined to observe or comply therewith, and that thereupon in December, 1905, the General Council of said City being the regularly and legally constituted legislative body of said City, introduced and duly adopted the resolution set forth in complainant's bill, and that the same was duly approved by the Mayor of said City and became a legally enacted resolution as set forth in complainant's bill. It admits that the Exchange in the City of Paducah is constructed as set forth in complainant's bill, and connection therewith are had as set forth in said bill.

And it denies that a telephone plant is unlike any other public service utility, in that it is necessary that the plant continue to grow and be enlarged as new patrons are acquired, or that it is never a finished plant.

It denies that the construction of a telephone plant is such that it cannot be taken down and removed to another place and be again erected, or that the cost of so doing would exceed the value of that part of the plant which could be used at some other plant; and it denies that the removal of this plant in Paducah would entail upon complainant great expense and irreparable injury or a very large sum of money in the destruction of its business which has been built up through a period of more than twenty-five years.

It denies that the action of the Legislative Council of the City of Paducah in declining to permit it to erect new poles and string new wires will of necessity or at all work a destruction of the existing poles and wires, or the other telephone apparatus connected therewith, including the expensive switch-board which was constructed and erected exclusively for use in the City of Paducah.

It denies that this complainant has permitted the City of Paducah to use its poles free of charge for its police and fire alarm wires, or that it has paid all taxes, or any taxes legally and lawfully assessed against it, to the City of Paducah; and it denies that complainant has from time to time or at all, furnished the City of Paducah with

free telephone service for the official business of the City, or that this plaintiff has been required to and has at great expense constructed under ground ducts and conduits within which to place its wires and cables, and it denies that complainant *is* in all respects or in any respects fully complied with the laws or met all reasonable or any demands of the City and denies that complainant has at all times or at any time been recognized by the City officials of the City of Paducah, or any of them, as legally upon the streets of the City or that it has been induced in reliance upon said rights or any rights to expend large sums of money in constructing adding to and extending its said telephone plant in said City, and it denies that the amount in controversy, exclusive of interest and costs, a sum — the value of Five Thousand (\$5,000) Dollars.

It denies that the action of the Legislative Council of the City of Paducah is prohibiting complainant from stringing additional wires or erecting additional poles, or any action of the Legislative Council of City of Paducah, is depriving this Complainant of its property without due process of law, or violating the obligation of any contract with complainant or violating the Fourteenth Amendment of the Constitution of the United States as set forth in complainant's Bill or violating Section Ten, Article 2, of said constitution or any part thereof as set forth in complainant's Bill. And it denies that complainant has a legal contract with the City of Paducah entitling it to maintain a telephone exchange in the City of Paducah or that the action of the Legislative Council in undertaking to prohibit this complainant from erecting its poles and stringing its wires owing to the inherent nature of the telephone business does impair the obligations of said contract and violates the Constitution of the United States, or violates the constitution of the State of Kentucky.

It denies that the action of the officials of the City of Paducah for the past twenty-five years or for any other period in recognizing complainant as having a valid and legal contract to construct and maintain a telephone exchange in the City of Paducah or in inducing complainant to spend large sums of money from time to time or any sum of money in the enlargement and extension of said telephone exchange or knew that the complainant was relying thereon estopped said City from now denying the rights of complainant or that the action of the legislative Council in undertaking to deprive the complainant of said rights, or any rights which it has in said city deprive- it of its property without due process of law or denies to it the protection of the law in violation of the Constitution of the United States.

And the defendant, the City of Paducah, further answering, says that on November 1, 1880, the time mentioned in the complainant's bill, as being the time when complainant claims through one W. G. Washburn to have obtained a right, grant or privilege to erect poles and hang wires thereon throughout the City of Paducah for the purpose of establishing a telephone exchange, that the said City had no authority in law of whatsoever kind or character to grant to this complainant or to any one else a franchise

or right or permission to erect poles and hang wires thereon throughout the said City of Paducah or any part thereof for the purpose of establishing a telephone exchange, and it further says that this complainant never legally accepted or received from the said City of Paducah any permission, privilege or right or grant to erect poles and hang wires thereon, throughout said City of Paducah, or any part thereof for the purpose of establishing a telephone exchange.

It further says that on the first day of April, 1887, it had no right in law to make the agreement that this complainant has alleged to have been made by Charles Reed, Mayor, and it further says that the said Charles Reed, as Mayor on said date, had no authority to make the contract set forth in complainant's Bill for the City. It further says that in August, 1904, the General Council of the City of Paducah, had no right by General Resolution or otherwise to make the contract that this complainant has set forth in complainant's Bill; that the City of Paducah did not have, in August, 1904, or at any other time since then, any lawful right to make a contract with complainant to the effect that complainant was to purchase a franchise or a right to conduct a telephone exchange in said City of Paducah, or to agree with the said complainant upon any form of franchise from the City of Paducah. And it says that the said pretended agreement between the said City and this complainant was and is in violation of Section 164 of the Constitution of the Commonwealth of Kentucky, which section is in words and figures, as follows:

"No County, City, Town, Taxing District or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, said municipality shall first, after duly advertising, receive bids therefor publicly and award the same to the highest and best bidder and it shall have the right to reject any or all bids.

This section shall not apply to trunk railways."

74 And this defendant now pleads said section of said Constitution and relies on same as a bar to the right of complainant to sustain or hold any contractual relations with the said City of Paducah by virtue of the joint resolution of August 1904, set forth in complainant's bill.

It further says that since the filing of complainant's bill, to-wit on January 4, 1906, the City of Paducah, by and through the General Council of said City duly and lawfully adopted a resolution in words and figures as follows:

"Whereas the General Council of the City of Paducah has heretofore adopted a resolution adopted by the Board of Councilmen on the 18th day of December, 1905, adopted by the Board of Aldermen on the 21st day of December, 1905, directing the Board of Public Works of the City of Paducah not to issue to the East Tennessee Telephone Company any permit to use the streets of Paducah, Kentucky, for any purpose until said East Tennessee Telephone Company shall first obtain a franchise to do business in the City of Paducah, Kentucky, now therefore for satisfactory reasons, Be it resolved,

That the General Council by this resolution and these presents doth re-cind, revoke and repeal said former resolution and declare same inoperative, null and void."

And it says that the above resolution was passed by the General Council of the City of Paducah on the said January 4th, 1906, and has remained ever since, and now is in full force and effect. And it says that neither before nor since the adoption of said resolution has this defendant ever attempted to take, molest or interfere with any of the property of said complainant.

It further says that since the filing of complainant's bill, to wit, on the 26th day of April, 1906, it tendered to the complainant in legal tender of the United States legal money in the sum of Three thousand Two hundred and Eighty-six and 50/100 (\$3286.50) Dollars, and that said sum was thereupon refused by the complainant and that the complainant declined and refused to accept said sum or any part thereof, and thereupon the defendant had said sum placed upon special deposit in the American-German National Bank in

the City of Paducah, subject to the order of said complainant, and the interest on same, and same has remained subject to complainant's order ever since said date, and is now so subject. It further states that said sum of \$3286.50 represents Three thousand (3,000) Dollars paid by complainant to defendant on the 23rd day of September, 1904, upon an attempted settlement made on said date between said complainant and this defendant as set forth in complainant's Bill, \$286.50 of said sum being interest on the said \$3000 to date of said tendering at the rate of six (6) per cent per annum. And defendant says *he* is now and always has been ready and willing and able to pay the said \$3,000 and interest to complainant and that it now tenders to complainant the said sum of \$3286.50 as a refund of the said \$3,000 paid by complainant to this defendant as set forth in complainant's Bill.

Defendant further says that the subject matter of complainant's bill therein set out is not within the jurisdiction of this Court, and that the cause of complaint alleged by complainant is not one arising under the constitution or laws of the United States. All of which matters and things this defendant doth aver to be true, and pleads as a bar to the right of complainant to further prosecute this action. And this defendant denies all unlawful combinations in said bill charged and confederacy wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the said plaintiff's bill of complaint contained, material or necessary for this defendant to make answer to, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable Court shall direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

CITY OF PADUCAH.

By JAMES P. SMITH, *Mayor*.

JAMES CAMPBELL, JR.,

HAI S. CORBETT,

Solicitors for Defendant.

76 STATE OF KENTUCKY,
County of McCracken, ss:

James Peterson Smith makes solemn oath and says that he is the Mayor of the City of Paducah, the defendant in the foregoing answer, and that he has read said answer, and that the statements therein made as of his knowledge are true and those made upon information, he believes to be true.

JAMES P. SMITH.

Sworn and subscribed to before me this 6th day of January, 1908.
My commission expires the last day of the next Kentucky Senate.

ROSCOE REED.

Filed January 6, 1908, At Rules.

77 *Agreement of Counsel.*

In the United States Circuit Court for the Western District of
Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, Defendant.

It is agreed between the complainant, East Tennessee Telephone Company, and the defendant, City of Paducah, that the replication of the complainant, East Tennessee Telephone Company, may be filed in this case on the 19th day of March, 1908, and when so filed to have the same force and effect as though filed on the March rule day, to wit, the 2nd day of March, 1908. Notice of the filing of same is hereby waived and all objections to the filing of same on the day named instead of the said rule day in March, are likewise waived.

This March 19th, 1908.

CITY OF PADUCAH,

By JAMES CAMPBELL, JR.,

City Solicitor.

EAST TENNESSEE TELEPHONE
COMPANY,

By WHEELER, HUGHES & BERRY.

78 In the United States Circuit Court for the Western District of
Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, Defendant.

Replication.

This replicant, East Tennessee Telephone Company, saving and reserving to itself all and all manner of advantage of exceptions

which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, City of Paducah, for replication thereunto sayeth that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

WHEELER, HUGHES & BERRY,
Solicitors for Complainant.

Filed March 19, 1908.

79

Order Extending Time to Take Proof.

PADUCAH, KENTUCKY, April 20, 1908.

1757.

EAST TENNESSEE TELEPHONE CO.

VS.

CITY OF PADUCAH.

On motion of plaintiff by attorney the time for taking proof herein is extended for 90 days, and this cause is continued.

Filed April 20, 1908.

80 In the United States Circuit Court for the Western District of
Kentucky, Paducah Division.

EAST TENNESSEE TELEPHONE & TELEGRAPH COMPANY, Complainant.

VS.

CITY OF PADUCAH, KENTUCKY, Defendant.

*Interrogatories to be Propounded to Robert W. Devonshire, of
Boston, Mass.*

Examined by SOLICITOR FOR COMPLAINANT:

1. State your name, age, residence and occupation?
2. State if you were ever employed by the National Bell Telephone Company, and if so, when and how long you remained in the employ of said Company?
3. If you say you were never employed by said Company, state if you ever had charge or the custody of any of the records of said

Company, and if so, how long they have remained in your possession, if they still remain in your possession?

4. What Company, if you know, owned the exclusive patent right to do a telephone business in 1880, in Paducah, Ky.?

5. If you say that James M. Ormes and Henry H. Talmig, doing business under the firm name of Paducah Bell Telephone Co. had such right, please state how you know said parties owned such right?

6. If you say that you have in your possession the original contract entered into between the National Bell Telephone Co. and the above named parties, doing business under the name of Paducah

81 Bell Telephone Co., please file a certified copy of such agreement with your deposition, and mark the same for identification "A"?

7. If you know, state to whom Messrs. Ormes and Talmig transferred their right to erect and operate a telephone exchange in the City of Paducah, Ky., and when such right was so transferred?

8. If you say that said right was transferred to the East Tennessee Telephone Co. of New York, please state how you know such fact?

9. If you say that you have the original contract between Ormes and Talmig and the East Tennessee Telephone Co., please file a copy thereof with your deposition marking the same for identification "B", and make the same part of your deposition?

10. Does the East Tennessee Telephone Co. of New York still own the right to erect and operate a telephone exchange in Paducah, Ky., if not, who does?

11. If you say the right is now owned by the East Tennessee Telephone Co. of Kentucky, please state how you know such fact?

12. If you say that you have in your custody the original contract of the East Tennessee Telephone Co. of New York transferring such right to the East Tennessee Telephone Co. of Kentucky, please give the date of such transfer, and file a copy of such contract with your deposition making it a part hereof, and marking the same for identification "C"?

13. Have you in your possession or under your control a contract dated April 1, 1881, between the American Bell Telephone Co. of Massachusetts and the East Tennessee Telephone Co. of New York reciting that the East Tennessee Telephone Co. holds certain leases, which contract is signed by the American Bell Telephone Co. by its general manager Theo. N. Vail and approved by W. H. Forbes, President, The East Tennessee Telephone Co. by Clarence Carey, Vice President, attested by D. I. Carson, Secretary, and the signatures of Clarence Carey and D. I. Carson witnessed by L. C. Talmig? If you say you have such contract in your possession or under your control, will you please file a copy of the same with your deposition marking the same "F" for identification?

14. If you say you have such a contract, please state if you have the contract referred to therein as Form 109D, which contract was entered into on the 21st day of June, 1881, and signed The American Bell Telephone Co. by its general manager, Theo. N. Vail, and approved W. H. Forbes, President, East Tennessee Telephone Co.

by Clarence Carey Vice Pres., attest D. I. Carson, Secretary, L. C. Talmig witness as to signatures of Clarence Carey and D. I. Carson, and if you say you have such contract, will you please file a copy of same as a part of your deposition, marking the same "L" for identification?

15. Please state any other or further fact that you may know relating to the controversy between the complainant and the defendant herein, or explain any answer to any question asked you about which has not been fully explained in your answer to such question?

WHEELER, HUGHES & BERRY,
Solicitors for Complainant.

Filed Aug. 22, 1908.

83 In the Circuit Court of the United States for the Western
District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, Defendant.

Notice.

The East Tennessee Telephone Company and Wheeler, Hughes & Berry, its solicitors, will take notice that the defendant, City of Paducah, desires the evidence of Robert W. Devonshire to be adduced in this cause to be taken orally.

September 10, 1908.

CITY OF PADUCAH,

By JAMES CAMPBELL, Jr., &

HAL S. CORBETT,

Solicitors for City of Paducah.

Return.

Received the within notice at Paducah, Ky., Sept. 10th, 1908. and executed the same on the East Tennessee Telephone Co., by delivering a true copy of this notice to A. L. Joines, manager and the highest officer of said company found in my district of the East Tennessee Telephone Co., for Western Kentucky, and on the firm of Wheeler, Hughes & Berry, by delivering a copy to Charles K. Wheeler, a member of the firm of Wheeler, Hughes & Berry, at Paducah, Ky., on Sept. 10th, 1908.

GEO. W. LONG, U. S. Marshal.

By ELWOOD NEEL, D. M.

Marshal fee \$4.00.

Filed September 15, 1908.

84 United States Circuit Court, Paducah Division.

EAST TENNESSEE TELEPHONE CO.

VS.

CITY OF PADUCAH.

Agreement.

It is agreed by counsel for complainant and by defendant that the depositions taken by complainant in Nashville, Tenn., on the — day of —, 1908, may be published without an order of court so to do and that same may be withdrawn from the clerk's office for the convenience of counsel for defendant in cross-examining witnesses in New York City.

Oct. 1, 1908.

WHEELER, HUGHES & BERRY,
For Complainant.
JAMES CAMPBELL, JR.,
For City of Paducah.

Filed Oct. 1, 1908.

85 PADUCAH, KENTUCKY, November 16, 1908.

EAST TENNESSEE TELEPHONE CO., Complainant.

VS.

CITY OF PADUCAH, Defendant.

Order.

This day came the parties and filed stipulation signed by said parties.

86 In the United States Circuit Court for the Western District of Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant.

VS.

CITY OF PADUCAH, Defendant.

Stipulation.

Counsel for complainant and for defendant agree upon the following stipulation of facts:

That the charter of the City of Paducah under which it was acting in 1880, when the original grant was made for the franchise mentioned in the bill of complaint herein, is contained in the Act of the General Assembly of the State of Kentucky of 1871 and that without making further proof of the book containing said Act the same is hereby agreed may be read in evidence and considered by the Court as the charter of the City of Paducah of said date and

under which it was acting from 1871 to 1884; it is further stipulated that if upon investigation it develops that an amendment or amendments to the charter as contained in the acts of the General Assembly herein referred to were made, such amendment or amendments to such charter of the City of Paducah, it is hereby agreed, are to likewise be considered by the Court as a part of the charter of the City of Paducah during said period.

It is further stipulated that Maurice McIntyre is the present clerk of the City of Paducah and as such has charge of the records of the General Council of the City; that he has made diligent search thereof and has been unable to find any authority from the General Council contained in said records, authorizing and empowering Charles Reed, then Mayor of the City of Paducah, to make the contract of April

1, 1887, referred to in the bill herein, whereby the City of
87 Paducah was then and is now using the poles of the complainant herein upon which to string its wires for fire alarms.

It is further stipulated that James Campbell, Jr., City Solicitor for the City of Paducah, acting for said City under and by virtue of a resolution duly passed by the General Council of the City of Paducah, did on the 26th day of April, 1906, tender to the complainant herein the sum of \$3286.50 lawful money of the United States, said sum representing \$3000.00 principal and \$286.50 interest on the amount paid by complainant, as set forth in complainant's bill from the 23rd day of September, 1904, to the 26th day of April, 1906; and said tender has been continuous since said date.

It is further stipulated that before the filing of the bill of complaint herein litigation was pending in the McCracken Circuit Court of Kentucky between the City of Paducah and the East Tennessee Telephone Company and between the East Tennessee Telephone Company and the City of Paducah and that the parties litigant in the said McCracken Circuit Court, in order to terminate said litigation, that is, the complainant and the defendant herein met and agreed upon terms of settlement, which terms were that the complainant herein was to pay to the City of Paducah the sum of \$3000.00 in compromise settlement of all claims of the City then existing against the Complainant and said city, through a duly authorized committee of its General Council, agreed to expose to sale a certain franchise, being the franchise referred to and exhibited with the defendant's bill herein; that afterwards said \$3000.00 was paid to the City of Paducah on the 23rd day of September, 1904, but the ordinance which it was agreed should be exposed to sale to erect and maintain a telephone system in the City of Paducah was not passed by the

General Council; that in lieu thereof the City of Paducah
88 offered to expose to sale a certain telephone franchise differing in terms from the original ordinance agreed on between the Complainant herein and the representatives of the City of Paducah, which latter ordinance the complainant herein rejected or notified the City of Paducah that it would not be a purchaser of said franchise if the same was perfected by legislative action and exposed for sale and said that it would not bid thereon. That afterwards, from time to time, conferences were had between the representatives of

the parties litigant looking to a settlement of this litigation until the summer of 1908, at which time the complainant herein notified the City of Paducah, through its Mayor and General Solicitor, that if the City would expose to sale the franchise as set forth in the ordinance offered to be sold in lieu of the original ordinance agreed on between the complainant and the defendant herein, that complainant would become a bidder and if possible a purchaser of the franchise in said ordinance contained and would thereupon dismiss this action and seek no further redress from said city, which proposition was refused by the City of Paducah. A copy of such last ordinance is filed herewith as part hereof marked "A."

To all of the foregoing, relative to the action of the City in negotiations looking to a settlement of this action, the City of Paducah agrees that the same is true, but objects and excepts to the competency and relevancy of said stipulation, insisting that while true, such evidence is not admissible.

This November 14, 1908.

JAMES CAMPBELL, JR., &
HAL S. CORBETT,

Counsel for Defendant.

WHEELER, HUGHES & BERRY,
Solicitors for Complainant.

Filed November 16, 1908.

89 United States Circuit Court for the Western District of
Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, Defendant.

Notice.

The City of Paducah, James Campbell, Jr. and Hal S. Corbett, its solicitors, will take notice that the East Tennessee Telephone Company will, on Tuesday, August 25, 1908, at the law office of Wheeler, Hughes & Berry on Broadway in Paducah, Kentucky, between the hours of nine o'clock A. M. and five o'clock P. M., proceed to take the depositions of witnesses to be read in its behalf upon the trial of the above entitled cause now pending in the United States Circuit Court for the Western District of Kentucky at Paducah, at which time and place you may be present and cross examine if you see proper.

This August 24, 1908.

WHEELER, HUGHES & BERRY,
For Complainant.

Return.

Executed Aug. 22, 1908, on the City of Paducah by delivering James P. Smith, Mayor of said City, and James Campbell, City Solicitor, each a copy of the within Notice.

JNO. W. OGILVIE, S. Mc.,
By C. H. OGILVIE, D. S.

90 In the United States Circuit Court for the Western District
of Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
vs.
CITY OF PADUCAH, Defendant.

The Deposition of A. L. Joynes (Taken at the Law Office of Wheeler, Hughes & Berry) Taken at the Law Office of Wheeler, Hughes & Berry on the 25th Day of August, 1908, to be read as Evidence on Behalf of the Complainant in the Above Styled Action Pending in the United States Circuit Court for the Western District of Kentucky.

The witness, being first duly sworn, testified as follows:

By SOLICITOR FOR COMPLAINANT:

Q. 1. Please state your name, age, residence and occupation.

A. A. L. Joynes; age, thirty-eight (38); residence, Paducah, Kentucky; occupation, District manager of East Tennessee Telephone Company.

Q. 2. Before you became district manager of the East Tennessee Telephone Company, how were you employed?

A. As manager for the same Company, at Bristol, Tennessee.

Q. 3. How long have you been district manager for the East Tennessee Telephone Company?

A. District manager for about four years.

Q. 4. What position, if any, did you hold with the Company at Paducah before you became district manager?

A. Manager at Paducah.

Q. 5. When did you assume charge of the Company's affairs as manager at Paducah?

A. March 28, 1893.

91 Q. 6. Were you employed by the Company at Paducah before you became manager?

A. No, not at Paducah.

Q. 7. When you assumed charge of the local exchange for the East Tennessee Telephone Company what way, if any, was the city using the poles of the complainant?

A. The City was using our poles for their fire alarm system.

Q. 8. Just how did she use them, tell what was done by the City with the poles?

A. All of their wires were strung on the top of the poles and their boxes attached to the poles.

Q. 9. How long did the City continue to use the poles of the East Tennessee Telephone Company by stringing wires on the top thereof and by attaching its alarm boxes to its poles after you assumed the management of the local exchange?

A. To the present time.

Q. 10. Did the City commence to use the poles of the complainant

for their fire alarm system after you became manager of the local exchange, and if not when did it first commence, if you know?

A. No, they were using them when I came; I don't know how long before then.

Q. 11. Has the City ever paid the complainant anything for the use of its poles?

A. No, sir.

Q. 12. Has its alarm system been extended from time to time since you became manager of the exchange here?

A. Yes, sir.

Q. 13. About how many poles, if you have any idea, owned by the complainant are used by the City?

A. Several hundred; I don't know just how many.

Q. 14. Do you know how the City commenced, or under what right it began the use of the poles for its alarm system?

A. Through an agreement with the City Council; an application was made for permission to set poles by—

(Counsel for defendant objects because witness stated they were using them before he became connected with the local exchange.)

Q. 15. Let him answer. Do you know whether such agreement was in writing or not?

A. Only from the records of the City Council.

Q. 16. If you can, will you obtain a copy of such record and file it with your deposition?

(Counsel for defendant objects to filing of record by Mr. Joynes because he is not competent to prove same.)

A. Yes, sir; I will.

A. L. JOYNES.

The witness is not cross examined.

STATE OF KENTUCKY,

County of McCracken, set:

I, Bess Settle, a Notary Public in and for the County and State aforesaid, certify that the foregoing depositions of A. L. Joynes, witness for complainant, was taken before me pursuant to notice hereto attached, at the time and place and for the purpose in the caption mentioned; that said witness was duly sworn by me before deposing; that by agreement said deposition was taken by me stenographically and the foregoing is a correct transcript of the stenographic notes.

I further certify that complainant was present by Mr. C. K. Wheeler, attorney, and defendant was present by Mr. James Campbell, Jr.

93 My commission expires January 29, 1910.

Given under my hand and seal this 2nd day of September 1908.

BESS SETTLE,
Notary Public, McCracken County, Kentucky.

My fee \$3.60 paid by East Tennessee Telephone Co.
BESS SETTLE, N. P.

Filed November 16, 1908.

Order of Submission.

PADUCAH, KENTUCKY, April 20, 1909

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH.

Ordered that this case be submitted to the court for trial.

U. S. Circuit Court, Western District of Ky.

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH.

Stipulation.

It is hereby stipulated and agreed that J. R. Puryear, Clerk of court may open the deposition of Robert W. Devonshire which has been filed herein, for the purpose of examination and without further publication. June 22nd, 1909.

WHEELER. HUGHES & BERRY,

For Plaintiff

JAMES CAMPBELL, JR.,

Att'y for Defendant

Filed June 22, 1909.

Order Adjourning Court.

PADUCAH, KY., July 7, 1909

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH.

Hearing arguments was continued and the court not being sufficiently advised, takes time, until tomorrow morning at 9 o'clock and court is accordingly adjourned until that hour.

97 United States Circuit Court, Western District of Kentucky, at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
vs.
CITY OF PADUCAH, KENTUCKY, Defendant.

Judgment.

This cause having been heard upon the pleading, exhibits and evidence and the arguments of counsel, and the court being now sufficiently advised, delivered an opinion in writing, which is filed, and pursuant thereto it is ordered, adjudged and decreed by the court that the right of the complainant, East Tennessee Telephone Company, a corporation under the laws of Kentucky, under its contract to maintain and operate a telephone exchange in the city of Paducah and to erect poles and string wires thereon in connection with such exchange is hereby upheld and sustained, as against the effort of the defendant to impair said contract, and the defendant, City of Paducah, having, as shown by the record, failed to carry out the agreement of compromise entered into between it and the complainant, though receiving parts of the proceeds of said compromise, the said city of Paducah, its officers, agents, employees and all other persons are hereby enjoined and restrained from interfering with or obstructing the complainant in operating a telephone exchange in said city and in connection therewith erecting poles and stringing wires thereon until the defendant city shall duly enact and put into force an ordinance in the exact form and of the exact substance agreed upon between the parties as set forth in the bill of complaint, and also until, under such ordinance, the franchise therein referred to has been fairly and in good faith offered at public sale and has fairly

and in good faith been sold in the way therein provided for;
98 but nothing herein shall be deemed or taken to interfere with the power of the defendant, City of Paducah, in all reasonable and proper ways to regulate such setting of poles and stringing of wires in the legitimate exercise of the police power of said city as affecting said telephone exchange and its appliances, nor shall anything herein be construed as prohibiting the said city from making rates for telephone service lower than those named in said ordinance, if it shall hereafter result that said rates yield to the complainant, or any other person who may purchase the franchise at the sale made pursuant to such ordinance, more than a fair return upon the reasonable value of the property at the time it is being used. It is the intention of this judgment to give to the city of Paducah the option of permitting the present status to remain perpetually or else to enact the agreed-upon ordinance and fairly to put it into force, and the court now reserves the right and the power to make any orders that may be needful not only to enforce the injunction but also to meet any emergency that may arise should the city, in the exercise of such

option, enact and put into force the ordinance referred to, and the case is held open for these purposes.

It is further ordered and adjudged by the court that the complainant, East Tennessee Telephone Company, do recover of the City of Paducah, Kentucky, its costs herein expended.

July 8th, 1909.

WALTER EVANS, *Judge*.

99 In the United States Circuit Court for the Western Division
of Kentucky.

In Equity.

EAST TENNESSEE TELEPHONE COMPANY, Plaintiff,

vs.

CITY OF PADUCAH, KENTUCKY, Defendant.

The depositions of James E. Caldwell and H. Blair Smith, taken at Nashville, Tennessee, August 18th, 1908, by consent, to be used as evidence on behalf of the plaintiff in the above entitled cause; caption, certificate and formalities being waived; it being stipulated that when the depositions are written out, signed and sworn to by the witnesses, they shall be transmitted by the Notary Public, to the Clerk of the Circuit Court of the United States in the city of Paducah, to be by him filed as evidence in this cause.

It is agreed that all exceptions for competency and relevancy are reserved to the hearing.

The said JAMES E. CALDWELL, being duly sworn, deposes as follows:—

Direct examination.

By Mr. GRANBERRY, for the plaintiff:

Q. You are president of the East Tennessee Telephone Company, the plaintiff in this cause?

A. I am, sir.

Q. That was organized under the laws of the State of Kentucky, was it?

A. Yes, sir.

Q. I hand you what purports to be a certified copy of the Charter of the East Tennessee Telephone Company of Kentucky, and ask you to state whether or not it is a correct copy?

A. I recognize this as being a copy of the charter of the company, and have no doubt as to its correctness.

100 Q. Do you attach it as Exhibit No. 1, to your deposition?

A. I do.

Exhibit No. 1.

Q. Were you connected in any way with the East Tennessee Telephone Company, a corporation organized under the laws of the State of New York?

A. I was Secretary of that Company.

Q. I hand you what purports to be a certified copy of the charter of that company: please examine it, and state whether or not it is such copy?

A. I have examined the paper you hand me, and it appears to be what it purports to be, and I have no doubt of its correctness.

Exhibit No. 2.

Q. I will ask you to state whether or not it corresponds with the copy of the charter set out in the official Minute Book of the East Tennessee Telephone Company of New York?

A. It does.

Q. Were you the last Secretary of the East Tennessee Telephone Company, of New York?

A. I was.

Q. Did it surrender its charter during the time you were Secretary?

A. Yes, sir.

Q. I will ask you to state whether or not you have in your possession now the official Minute Book of the East Tennessee Telephone Company of New York?

A. I have in my possession the original book.

Q. I will ask you to examine that book, and state whether or not the following is a correct copy of the Minutes of the Board of Directors held in New York on June 24th, 1880?

A. It is.

Q. I will ask you to attach said copy as exhibit No. 3 to your deposition.

A. I will.

Exhibit No. 3.

101 Q. Also examine the following papers and attach copies of the Minutes of the — Executive Committee, held July 29th, 1880, (Ex. No. 4); the Executive Committee, held June 16, 1881, (Ex. No. 5); and the Minutes of the Annual Meeting of Stockholders held in New York June 16th, 1881 (Ex. No. 6); the Minutes of a Special Meeting of Directors held March 15, 1882 (Ex. No. 7); Minutes of a regular meeting of the Board of Directors, held April 20th, 1882 (Ex. No. 8), and the Minutes of the Annual Meeting of Stockholders held the 21st day of June, 1883.

A. I have examined the Minute book and attach copies hereto as exhibits. These minutes are all very regularly and carefully kept.

Q. Looking at the Minutes of the Annual Meeting of Stockholders, held June 16th, 1881, where the following recital appears: "Exchanges have been established during the year at Chattanooga, Tenn., Knoxville, Tenn., Lexington, Paducah, and Franklin, Ky.; total subscribers, 381." Above each of the foregoing named cities appear certain numbers. Please explain what these mean.

A. The figures above indicate the number of subscribers at each exchange; and the number at Paducah was fifty, at that time.

Q. State whether or not there was any transfer of the Paducah

Exchange and other property by the East Tennessee Telephone Company of New York to the East Tennessee Telephone Company of Kentucky?

A. There was, on November 16th, 1887.

Q. Have you the original deed of conveyance; if so, attach it as an exhibit to your deposition?

Exhibit No. 10.

A. Yes, sir, I have it, over my own signature as Secretary.

102 Q. State whether or not the East Tennessee Telephone Company, of Kentucky, has accepted the provisions of the present Constitution of Kentucky; if so, file a certified copy of its Acceptance.

A. It has done so I know, and I here attach a copy of it.

Exhibit No. 11.

Q. I will ask you to state whether or not you have in your possession, as Secretary of the East Tennessee Telephone Company of New York, any papers with reference to the granting of permission to the East Tennessee Telephone Company of New York, to do a telephone business in the city of Paducah, by the officials of that city; if so, attach them as exhibits to your deposition.

A. I have them, and hereby attach them to this deposition, as exhibits.

Exhibit No. 12.

Q. It appears from the papers filed that the right was granted to the Bell Telephone Company. I will ask you to state whether or not that was the name under which the East Tennessee Telephone Company of New York was doing business at Paducah, when it first started the exchange?

A. It undoubtedly was.

Q. I hand you a paper purporting to be an agreement dated April 1st, 1887, between the East Tennessee Telephone Co. and the City of Paducah; state whether or not that is an original paper in the files of the East Tennessee Telephone Company of New York?

A. It is.

Q. Will you attach it as an exhibit to your deposition?

A. I do.

Exhibit No. 13.

Q. As president of the East Tennessee Telephone Company of Kentucky, have you any knowledge of the negotiations that were pending between the City of Paducah and the plaintiff company about 1904, with reference to a compromise agreement?

103 A. Yes, I have knowledge of it.

Q. I will ask you whether or not you agreed to the proposed settlement?

A. I did.

Q. Did you have the three thousand dollars paid, in accordance with the agreement?

A. I did.

Q. Did you rely upon the agreement, when you paid the money?

A. I did, implicitly, and had not a doubt of its good faith.

Q. I will ask you to attach the same as an exhibit to your deposition.

A. I do.

Exhibit No. 14.

Q. I hand you what purports to be a certified copy of the Minutes of the Common Council of the City of Paducah, dated October 23rd, 1880, and ask you to attach it as an exhibit to your deposition.

A. I have the paper you refer to, and hereby attach it as an exhibit to my deposition.

Exhibit No. 15.

Q. Was that the permission under which the exchange was established in Paducah originally?

A. It was.

Q. Has the exchange been in operation continuously since that time?

A. It has, continuously without an intermission.

Q. It is the same exchange that was purchased by the East Tennessee Telephone Company of Kentucky, in November, 1887?

A. It is.

Q. And the same one which has continuously been operated since?

104 A. Yes, it is the same identical property, enlarged and improved, and continued.

Q. I hand you what purports to be a copy of the Resolution dated December 18th, 1905, and ask you to state whether or not this was served upon you?

A. Yes sir, I have such a paper, and it was served upon me.

Q. Will you attach it as exhibit to your deposition?

A. Yes sir.

Exhibit No. 16.

Q. I will ask you to file, as exhibit to your deposition, a copy of the Minutes of the City of Paducah of date December 17, 1888.

A. I have said paper, and hereby attach it as an exhibit to this deposition.

Exhibit No. 17.

Q. Mr. Caldwell, how long have you been engaged in the Telephone business?

A. Since about 1883.

Q. At that time, was the right to do a telephone business covered by patents?

A. It was.

Q. Could any one do a telephone business, anywhere in the United States, without securing permission from the owners of the patent rights?

A. They could not.

Q. At that time, who owned the patent right?

A. Bell Telephone Company of Boston.

Q. Did the East Tennessee Telephone Company of New York buy the patent rights to do a telephone business in Paducah and other places in Kentucky and Tennessee?

A. It did.

105 Q. Did the East Tennessee Telephone Company of Kentucky acquire those rights when it purchased the physical property.

A. It did.

Q. When did those telephone patents expire?

A. They began to expire along about the middle of 1890; between 1890 and 1900.

Q. When were telephone exchanges first erected in this country.

A. Well, perhaps the first was some time in 1878-'78 or '79, the first primitive exchanges. The first exchanges were erected about that time, as my memory serves me. There were only a very few at that time.

Cross examination waived.

Further this deponent saith not.

JAMES E. CALDWELL.

Subscribed and sworn to before me this 10th day of September, 1908.

[SEAL.]

W. OTHO BEALL,

Notary Public.

My commission expires January 17th, 1912.

106 EXHIBIT NO. 1 TO DEPOSITION OF JAMES E. CALDWELL.

Articles of Incorporation of the East Tennessee Telephone Company.

We, whose names are signed hereto hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter 56 of the General Statutes of the Commonwealth of Kentucky, and the acts amendatory thereof and for the purposes and upon the terms and conditions in these articles hereinafter expressed.

Article 1. The names of the corporators are we whose names are undersigned. The name of the corporation is "East Tennessee Telephone Company." Its principal place of business is in the city of Bowling Green, County of Warren, State of Kentucky.

Article 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger system.

Article 3. The amount of capital stock authorized is not less than five hundred thousand dollars; and may be increased to \$1,000,000; divided into shares of one hundred dollars each, and is to be paid in

by subscribers upon the call, and twenty days' notice from Board of Directors of said Company.

Article 4. The existence of said corporation commencing on the 5th day of May, 1887, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three fifths in amount and a majority in number of the stockholders.

Article 5. The greatest amount of indebtedness to which said company shall subject itself at any time shall not exceed fifty per cent of its capital stock actually paid in.

107 Article 6. The affairs of said company are to be controlled by Board of five Directors, and a President and Vice-president, to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the company and shall be elected by the stockholders. The term of office of the Directors elected at the first meeting of the stockholders shall expire on the day of the annual election of said company then next ensuing. At each annual meeting the stockholders of the company shall elect five stockholders to serve as directors for the ensuing year, or until their successors are elected. All other vacancies to be filled in accordance with the by laws of the corporation. Should there from any cause be a failure to elect on said day then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose. And the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Article 7. The private property of the corporators and stockholders of said corporation shall be exempt from corporate debts of said company.

Witness our hands this 5th day of May, 1887.

SAMUEL J. KEITH.
ISAAC T. RHEA.
O. F. NOEL.
JAMES E. CALDWELL.
JOHN SENIHAN, Jr.

STATE OF KENTUCKY,
Warren County, ss:

I, S. M. Matlock, Clerk of the Warren County Court, do certify that the foregoing articles of incorporation of the "East Tennessee Telephone Company" was this day produced to me in my office and acknowledged by Samuel J. Keith, Isaac T. Rhea, O. T. 108 Noel, James E. Caldwell and John Senihan, Jr., to be their act and deed and that I have duly recorded same with this certificate in my office.

Given under my hand this 5th day of May, 1887.

S. M. MATLOCK, Clerk.

Received and filed June 15th, 1887,
Recorded June 20th, 1887.

COMMONWEALTH OF KENTUCKY,
OFFICE OF SECRETARY OF STATE.

I, H. V. McChesney, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereunto sign my name, and have caused my official seal to be affixed.

Done at Frankfort, this 16th day of January 1905.

[SEAL.].

H. V. MCCHESENEY,
Secretary of State.

109 EXHIBIT No. 2 TO DEPOSITION OF JAMES E. CALDWELL.

Certificate of Association of "The East Tennessee Telephone Company."

Know all men by these presents, that we the undersigned, do hereby associate ourselves together under and by virtue of an Act of the Legislature of the State of New York entitled "An Act to provide for the incorporation and regulation of Telegraph Companies" passed April 12, 1848, and the various Acts amendatory thereof, for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph partly within and partly beyond the limits of the State of New York, and do hereby certify as follows:

1. The name assumed to distinguish this Association, and to be used in its dealings, and by which it may sue and be sued, is

"The East Tennessee Telephone Company."

II. The general route of the line or lines of telegraph of this Association, and the points to be connected therewith shall be as follows:

From the principal office of this Association in the City of New York in said State of New York, by some convenient route through or across the intervening States, to the City of Knoxville in the State of Tennessee, and thence to the City of Chattanooga in said State, and to various points and places within the respective limits of said Cities, and from said Chattanooga or Knoxville by some convenient route to the Cities of Frankfort and Lexington in the State of Kentucky, and to various points and places within or about said last mentioned Cities or either of them, and also to any other points and places within or throughout the said State of Kentucky and Tennessee connecting together the said Cities herein mentioned, or points and places within or about the same, including such telephonic exchanges or district stations as it may be desired to establish within the territory herein mentioned.

III. The Capital Stock of this Association shall be Eighty thou-

sand (\$80,000) Dollars, divided into eight hundred shares of the par value of One Hundred Dollars each.

IV. The names and places of residence of the Shareholders of this Association, and the number of shares held by each of them respectively are as follows:

Name.	Places of residence.	No. of shares.
James M. Ormes,	New York, N. Y.....	200
Henry H. Tallmadge,	Washington, D. C.....	200
Lewis C. Tallmadge,	Chicago, Ill.	200
David I. Carson,	New York, N. Y.....	200

V. This Association shall commence on this Twenty sixth day of May, 1880, and terminate on the Twenty sixth day of May, 1930.

Witness our hands and seals this Twenty sixth day of May, 1880.

D. I. CARSON. [s.]
 HENRY H. TALLMADGE. [s.]
 JAMES M. ORMES. [s.]
 LEWIS C. TALLMADGE. [s.]

111 STATE OF NEW YORK,

City and County of New York, ss:

On this 27th day of May in the year 1880, before me personally came David I. Carson to me known to be one of the individuals described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein mentioned.

[Wm. Arnoux Seal.]

WM. ARNOUX,
Notary Public, Kings & New York Cos.

DISTRICT OF COLUMBIA,

County of Washington, ss:

On this 29th day of May in the year 1880, before me personally came Henry H. Tallmadge, to me known to be one of the individuals described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein mentioned.

Witness my hand and notarial seal on the day and year last above written.

[Geo. F. Graham Seal.]

GEO. F. GRAHAM,
Notary Public.

UNITED STATES OF AMERICA,

District of Columbia,

City and County of Washington, ss:

In the City, County and District aforesaid on this 29th day of May, A. D. 1880, before me, Jos. T. K. Plant, a Commissioner of

the State of New York for the District of Columbia, personally appeared Henry H. Tallmadge of Washington City, D. C., known to me and to me known to be the person whose name is signed
 112 to the above instrument of writing, and who acknowledged to me that he had signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal at my office in Washington City, D. C., on this 29th day of May, A. D. 1880.

[J. T. K. Plant Seal.]

JOS. T. K. PLANT,
*Comm'r of the State of New York
 for the District of Columbia.*

STATE OF ILLINOIS,
*County of Cook,
 City of Chicago, ss:*

I, Phillip A. Hoyne, a Commissioner for the State of New York, residing in the City of Chicago, County of Cook and State of Illinois, do hereby certify that on this ninth day of June in the year of our Lord One Thousand Eight Hundred and Eighty, personally appeared before me at the City of Chicago in the County and State aforesaid, James M. Ormes and Lewis C. Tallmadge, to me known to be the same persons described in and who executed the foregoing instrument of writing and severally acknowledged the same to be their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my seal at Chicago, in the County and State aforesaid this ninth day of June, One Thousand Eight Hundred and Eighty.

[Phillip A Hoyne Seal.]

PHILLIP A. HOYNE,
*Com'r for the State of New York,
 Residing in Chicago, Illinois.*

STATE OF NEW YORK,
City and County of New York, ss:

I, William A. Butler, Clerk of the said City and County, and clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Certificate
 113 of Incorporation of "The East Tennessee Telephone Company," on file in my office and that the same is a correct Transcript therefrom, and of the whole of such original.

Endorsed Filed, and Recorded 23 June, 1880.

In witness whereof, I have hereunto subscribed my name, and affixed my official seal, this 23 day of June, 1880.

[SEAL.]

WILLIAM A. BUTLER, *Clerk.*

(Endorsed:) Certified Copy of Certificate of Association of The East Tennessee Telephone Company, Dated May 26, 1880. State of New York. Office of the Secretary of State. Filed June 24, 1880. Anson S. Wood, Deputy Secretary of State.

STATE OF NEW YORK,

Office of the Secretary of State, ss:

I have compared the preceding with the certified copy of Certificate of Incorporation of "The East Tennessee Telephone Company," filed in this office on the 24th day of June, 1880, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this thirty-first day of July, one thousand nine hundred and eight.

[SEAL.]

M. A. FITZGERALD,
Second Deputy Secretary of State.

114 EXHIBIT NO. 3 TO DEPOSITION OF JAS. E. CALDWELL.

At a meeting of the Directors of the East Tennessee Telephone Company, held at the Western Union Building in the city of New York, June 24th, 1880:

On motion resolved that the Executive Committee be authorized and requested to arrange for the securing of such patent licenses or other franchises as may be necessary to the conduct of the company's business, by purchase or otherwise on such terms as may be practicable.

115 EXHIBIT NO. 4 TO DEPOSITION OF JAS. E. CALDWELL.

Minutes of Meeting of Executive Committee East Tenn. Telephone Co., Held in W. U. Bldg., Thursday, July 29, 1880.

Present, Clarence Carey, D. I. Carson.

The following resolution was on motion adopted:

Resolved, that the East Tenn. Tel. Co. purchase from James M. Ormes and H. H. Tallmadge, their contracts with the American Bell Telephone Co. as follows, viz:

Exchange contract for Chattanooga, Tenn.

"	"	"	Knoxville,	"
"	"	"	Lexington, Ky.	
"	"	"	Frankfort, Ky.	
"	"	"	Paducah, Ky.	

Agency,—(or private line) Contract for the Counties of Fentress, Putnam, White, Cumberland, Van Buren, Grundy and Franklin, in Tennessee.

Resolved, that this Co. pay to the said James M. Ormes and H. H. Tallmadge for the said franchise, the sum of forty thousand dollars in the capital stock of the company, being four hundred shares of the par value of \$100 each, and that the officers of the company are hereby authorized to issue said stock fully paid up to the said Ormes and Tallmadge or their order, upon the transfer of the contracts aforesaid to the company.

116 EXHIBIT No. 5 TO DEPOSITION OF JAMES E. CALDWELL.

*Minutes of Meeting of Executive Committee East Tenn. Tel Co.,
June 16, 1881.*

On motion the following preamble and resolution were adopted:
Whereas, under authority voted at a meeting of the Directors of the East Tennessee Telephone Co., held June 24, 1880, the Executive Committee purchased from the holders thereof the license for certain telephone exchanges, namely for Chattanooga and Knoxville, Tenn., and Lexington, Frankfort and Paducah, Kentucky, and the license to rent telephones for private lines in the counties of Fentress, Putnam, White, Cumberland, Van Buren, Grundy and Franklin in Tenn., paying therefor the sum of \$40,000 in the paid up shares of the Capital Stock of said Co.

117 EXHIBIT No. 6 TO DEPOSITION OF JAMES E. CALDWELL.

*Minutes of Annual Meeting of Stockholders Held at the Office of the
Company in New York, June 16, 1881.*

On motion Mr. L. C. Tallmadge was made Chairman, and D. I. Carson, Secretary.

The Vice President submitted his report for the fiscal year, ending June 1, 1881, of which the following is an abstract.

Receipts from sale of stock.....	\$49,000.00	
Total receipts from revenue.....	18,956.17	
Total receipts		\$67,956.17
Disbursements: Operating expense %....	\$6,231.54	
Construction %	59,982.15	66,213.68
		\$1,742.48

98

Exchanges have been established during the year at Chattanooga,
56 149 50 28
Tenn., Knoxville, Tenn., Lexington, Paducah and Frankfort, Ky..
Total 381, Subs. Twenty-five subscribers each have been obtained
at Maysville and Clarksville, and exchanges in progress of building.

118 EXHIBIT No. 7 TO DEPOSITION OF JAMES E. CALDWELL.

*Minutes of Special Meeting of Directors of the East Tenn. Tel Co.
Held M'ch 15, 1882.*

On motion, it was Resolved, That the Secretary be instructed to offer to sell to the Evansville Telephone Exchange the telephone

rights of this company for the counties of Montgomery, Tenn., and Crittenden, Caldwell, Graves, Fulton, Livingston, Lyon, McCracken, Marshall, Trigg, Christian, Calloway, Hickman and Ballard, Ky., including the exchange of Clarksville, Tenn., and Paducah and Hopkinsville, Ky., (exclusive of cost of construction of Hopkinsville), for twenty thousand dollars, provided there are no legal obstacles to such sale.

119 EXHIBIT NO. 8 TO DEPOSITION OF JAMES E. CALDWELL.

Minutes of Regular Meeting of Board of Directors of the East Tenn. Telephone Co., April 20, 1882.

On motion, it was resolved, that the proposition to sell to the Evansville Telephone Exchange the counties of Crittenden, Caldwell, Livingston, Lyon, McCracken, Marshall, Trigg, Christian, Calloway, Graves, Fulton, Hickman and Ballard, Ky., and Montgomery, Tenn., authorized at Special meeting of the Board March 15, '82, be withdrawn, and the Sec'y instructed to so inform the Evansville Co.

120 EXHIBIT NO. 9 TO DEPOSITION OF JAMES E. CALDWELL.

(To Substitute for Stockholders' Meeting of June 21, 1883, by Agreement.)

Minutes of Adjourned Meeting of Stockholders of East Tenn. Tel. Co., July 6th, 1883.

The annual report of the president was read as follows:

The Annual Report of the President of the East Tennessee Telephone Co. to the Stockholders at Their Meeting June 21, 1883.

To the stockholders of the East Tennessee Telephone Company.

GENTLEMEN: * * *

There were on June 1, 1882, in the Treasury 50 shares of the company's stock which were sold at a premium of \$1200, above the par value, which amount was credited to interest account.

There were in operation June 1, 1882, 8 exchanges with 593 stations, viz:

Lexington, Ky.	Hopkinsville, Ky.
Maysville, "	Clarksville, Tenn.
Frankfort, "	Chattanooga, "
Paducah, "	Knoxville, "

121 EXHIBIT No. 10, TO DEPOSITION OF JAMES E. CALDWELL.

Conveyance.

This agreement made this the 16 day of Nov., A. D. 1887, by and between The East Tennessee Telephone Company of New York of the first part, and the East Tennessee Telephone Company of Kentucky of the second part,

Witnesses: That, whereas, the party of the first part has sold, and the party of the second part has purchased certain properties and rights and franchises and privileges hereinafter described, the property of the party of the first part, for the consideration of One hundred and thirty two thousand eight hundred and twenty one dollars (\$132,821.00) in shares of the capital stock of the party of the second part, at par.

And, whereas, the board of directors of the party of the first part at a meeting duly and regularly called, ordered and directed said sale to be made and this conveyance in the performance thereof to be executed for and in the name of the said company of the first part:

And, whereas, the stockholders of said company (of the first part) at a meeting duly and regularly called to consider said proposition ratified and approved the same, and unanimously ordered and directed this conveyance to be made,

And, whereas, the stockholders of the party of the second part, and also the directors, have ordered and directed said purchase to be made for and by said company:

Now therefore, in consideration of the said sum of one hundred and thirty-two thousand eight hundred and twenty-one dollars by the party of the second part to the party of the first part paid,
122 in shares of the capital stock at par of the party of the second part, the receipt whereof is hereby acknowledged, The East Tennessee Telephone Company of New York, the party of the first part, has bargained and sold, and does hereby transfer, alien, convey and set over to the said party of the second part, the following property, viz:

In the State of Kentucky: All and every of the poles, wires, exchanges, boards, instruments, etc., and every species of property, whatsoever, appertaining and belonging to the telephone system or plant of and belonging to the party of the first part in the County of Warren and particularly in the City of Bowling Green in said County, and in the Counties of Adair, Allen, Anderson, Ballard, Barren, Bell, Bath, Bourbon, Boyd, Boyle, Bracken, Breathitt, Butler, Calloway, Carter, Casey, Caldwell, Christian, Clay, Clark, Clinton, Crittenden, Cumberland, Edmonson, Elliott, Estill, Fayette, Fleming, Floyd, Fulton, Franklin, Garrard, Green, Greenup, Graves, Harlan, Harrison, Hart, Hickman, Jackson, Jessamine, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Livingston, Lincoln, Logan, Lyon, Madison, Magoffin, Marion, Martin, Mason, Marshall, McCracken, Menifee, Metcalfe,

Mercer, Monroe, Montgomery, Morgan, Muhlenburg, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Rockcastle, Rowan, Russell, Robertson, Scott, Simpson, Taylor, Todd, Trigg, Washington, Wayne, Whitley, Wolfe, Woodford and all the rights, privileges and franchises of the party of the first part to have, erect, operate and maintain said telephone poles, wires, exchanges and systems in said Counties, under and by virtue of the laws of Kentucky, and of any of said Counties, and of any and all towns or municipalities therein:

123 In the State of Tennessee: All and every of the poles, wires, exchanges, boards, instruments, etc., and every species of property whatsoever, appertaining and belonging to the telephone system, or plant of and belonging to the party of the first part, in the Counties of Anderson, Bledsoe, Blunt, Bradley, Campbell, Carter, Claiborne, Coffee, Cocke, Cumberland, Fentress, Franklin, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, James, Jefferson, Johnson, Knox, Lincoln, Loudon, Marion, McMinn, Meigs, Monroe, Montgomery, Morgan, Moore, Overton, Pickett Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Unicoi, Union, Van Buren, Warren, Washington and White; and all the rights, privileges and franchises of the party of the first part to have, erect, operate and maintain said telephone poles, wires, exchanges and systems in said Counties, under and by virtue of the laws of Tennessee, and of any of said Counties, and of any and all towns or municipalities therein.

Also all property of every kind and description owned by the party of the first part or in which it may have any interest either legal or equitable and particularly any and all telephone lines which it may own or control including all wires, poles, insulators, switchboards and batteries, and all machinery, tools and other articles of every kind and nature appurtenant to its business and owned by it or in which it may have any interests, wherever the same may be situated, and also all notes, bills, claims and book accounts due or to become due and all contracts, licenses, rights, and concessions and all documents, correspondence, books and papers pertaining to its business and in its possession or under its control, meaning hereby to assign all property of said party of the first part. All telephones in the possession of the first party are the property of the American Bell Telephone Company.

124 The Agreement made with and license contracts issued to the first party by The American Bell Telephone Company are assigned subject to the consent of said company.

To have and to hold the same to the party of the second part, its successors and assigns forever.

The party of the first part agrees that it will execute and deliver to the party of the second part, its successors and assigns, all such further conveyances or assignments as may be deemed necessary or expedient by the party of the second part, its successors or assigns, to vest fully in it or them all its right, title and interest in and to any contract, license, privilege or other property hereby intended to be conveyed.

As a part of the consideration of this conveyance the party of the second part hereby agrees to assume, keep and perform all obligations of the party of the first part under any and all contracts and agreements with any and all parties heretofore made by the party of the first part and to assume and pay any and all claims and demands which may be lawfully made against the party of the first part.

In Witness Whereof, the said parties have caused their respective corporate seals to be hereto affixed and these presents to be signed by their respective officers on the day and year first above written.

[SEAL.]

THE EAST TENNESSEE TELEPHONE
COMPANY (OF N. Y.),

By O. F. NOEL, *President, and*

By JAMES E. CALDWELL,

Secretary, of the First Part.

[SEAL.]

EAST TENNESSEE TELEPHONE COM-
PANY (OF KY.),

By ISAAC F. RHEA, *Vice President, and*

By JAMES E. CALDWELL,

Secretary, of the Second Part.

125 STATE OF TENNESSEE,
Davidson County, ss:

Personally appeared before me, W. E. Metzger, a Notary Public in and for said County, elected and appointed, acting, and duly commissioned and qualified as such, the within named O. F. Noel, whose name is signed to the foregoing conveyance as President of The East Tennessee Telephone Company of New York, and the within named James E. Caldwell, whose name is signed to the foregoing conveyance as Secretary of said company, both of whom I personally know to be the identical persons whose names are affixed as President and Secretary, and acknowledged before me on this day, that being informed of the contents of this conveyance, they executed the same voluntarily for, and in the name of said company and for the purposes therein expressed and as their voluntary act and deed as the President and Secretary thereof on the day the same bears date; and the said O. F. Noel President, and the said James E. Caldwell, Secretary, being by me first duly sworn, did severally depose and say: that the said O. F. Noel is the President of The East Tennessee Telephone Company of New York, the within named bargainer, and the said James E. Caldwell is the Secretary thereof; that they knew the corporate seal of said company, and that the seal affixed to the foregoing instrument was such corporate seal; that they voluntarily executed the foregoing instrument as their act and deed as the President and Secretary, respectively, of the said company, and voluntarily affixed the said corporate seal by the order and authority of the board of directors of the said company.

Witness my hand and official seal, at my office in the city of Nashville, County of Davidson, State of Tennessee this the 17 day of Nov., A. D. 1887.

[SEAL.]

W. E. METZGER,
Notary Public.

126 STATE OF TENNESSEE,
Davidson County, ss:

Personally appeared before me, W. E. Metzger, a Notary public in and for said County, elected and appointed, acting and duly commissioned, and qualified as such, the within named Isaac F. Rhea, whose name is signed to the foregoing conveyance as Vice-President of the East Tennessee Telephone Company of Kentucky, and the within named James E. Caldwell, whose name is signed to the foregoing conveyance as Secretary of said company, both of whom I personally know to be the identical persons whose names are affixed as President and Secretary, and acknowledged before me on this day, that being informed of the contents of this conveyance, they executed the same voluntarily for and in the name of said company, and for the purposes therein expressed, and as their voluntary act and deed as the President and Secretary thereof on the day the same bears date; and the said Isaac F. Rhea, President, and the said James E. Caldwell, Secretary being by me first duly sworn, did severally depose and say: that the said Isaac F. Rhea, is the Vice-President of the East Tennessee Telephone Company of Kentucky, the within named bargainor, and the said James E. Caldwell is the Secretary thereof; that they know the corporate seal of said company, and that the seal affixed to the foregoing instrument was such corporate seal; that they voluntarily executed the foregoing instrument as their act and deed as the President and Secretary, respectively of the said company, and the act and deed of the said company, and voluntarily affixed the said corporate seal by the order and authority of the board of directors of the said company.

Witness my hand and official seal, at my office in the city of Nashville, County of Davidson, State of Tennessee, this 17th day of Nov., A. D. 1887.

[SEAL.]

W. E. METZGER,
Notary Public.

127 EXHIBIT No. 11 TO DEPOSITION OF JAMES E. CALDWELL.

Resolved, That, Whereas, this corporation was created under and in pursuance of Chapter 56 of the general statutes of the State of Kentucky, and acts amendatory thereto, and its Articles of Incorporation were properly signed, acknowledged, recorded and published on the 5th day of May, 1887; and, whereas, said corporation has been doing business under said articles of incorporation in the State of Kentucky for some years past and is now doing business under said articles of incorporation, now, in obedience to and in compliance with the requirements of section five hundred and seventy of the Kentucky Statutes, the East Tennessee Telephone Company accepts the provisions of the present constitution of the State of Kentucky, which was adopted the 28th day of September, 1891, and John W. Hunter, Jr., the Secretary of this Company is hereby directed and instructed to file a copy of this resolution, certi-

fied under the seal of this company, in the office of the Secretary of State of the State of Kentucky.

I, John W. Hunter, Jr., Secretary of the East Tennessee Telephone Company, hereby certify that the above and foregoing is a true and correct copy of a resolution passed by the Board of Directors of said Company on the 13th day of September, 1906, and that the same appears upon the official minute book of said company for that date.

Witness my hand and the official seal of said Company on this the 14th day of September, 1906.

[SEAL.]

J. W. HUNTER, JR., *Sec'y.*

Filed Sept. 10, 1906.

H. V. McCHESNEY,
Sec'y State.

128

COMMONWEALTH OF KENTUCKY,
OFFICE OF SECRETARY OF STATE.

I, H. V. McChesney, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereunto sign my name, and have caused my official seal to be affixed.

Done at Frankfort, this 26th day of June, 1907.

[SEAL.]

H. V. McCHESNEY,
Secretary of State.

129 EXHIBIT No. 12 TO DEPOSITION OF JAMES E. CALDWELL.

Council Proceedings Nov. 15, 1880 (page 203).

To the Honorable Mayor and Common Council.

GENTLEMEN: We your committee to whom was referred the petition of W. T. Washburn agent of Bell Telephone Co. in the matter of erecting telephone Post throughout the city, would recommend that said prayer be granted on the following conditions: viz, the poles not to be less than 35 feet in height, 10 inches in diameter at base and in good proportion all the way to the top, to be painted red at base and white from red to the top of posts.

E. J. HOLLAN,
W. E. AUGUSTUS.

Copy.
Attest,

HARRY L. FISHER, C. C. P.

130

Council Proceedings Nov. 15, 1880.

To the Honorable Mayor and Common Council.

GENTLEMEN: We, your committee, to whom was referred the petition of W. T. Washburn, agent Bell Telephone Co. in the matter of erecting telephone poles throughout the city, would recommend that said prayer be granted on following conditions, viz: The poles not to be less than 35 ft. in height, 10 inches in diameter at the base and in good proportion all the way to the top to be painted red at the base and white from red to top of posts.

E. J. HOLLAN,
W. E. AUGUSTUS,
Committee.

131

Council Proceedings Nov. 1, 1880.

To his Honor the Mayor and Common Council.

GENTLEMEN: We, the subscribers, humbly petition your honorable body for permission to erect poles and new wires thereon, throughout your city for the purpose of establishing a telephone exchange for the convenience of your citizens.

Trusting that your honorable body will grant our petition.

Respectfully,

BELL TEL. CO.,
Per WM. WASHBURN (*Agt.*).

132

Concerning Telegraph and Telephone Poles.

Be it Ordained by the Mayor and Council of the city of Paducah:

SECTION 1. That no person shall erect any Telegraph or Telephone poles, or any other poles, or posts for like purposes within the limits of said City. Unless said pole, or post, are straightly and clearly and smoothly made, nor shall any Telegraph or Telephone poles hereinafter erected in said city be braced or propped by guy-poles, or other support, nor shall any other Telegraph or Telephone pole be so placed as to obstruct the passageway leading from any building into a street or alley.

SECTION 2. Any person violating this Ordinance shall be fined not less than Five nor more than Ten Dollars, and each pole, or post that any person may erect in violation of any provision of this ordinance shall constitute a separate.

SECTION 3. This ordinance shall take effect ten days after its passage.

Adopted Feb'y 5th, 1883.

(Signed)

D. SMEDLEY.

Approved Feb'y 14th, 1883.

(Signed)

C. REED, *Mayor.*

- 133 Petition to the Hon. Mayor and City Council of Paducah, at its Regular Meeting Nov. 1st, 1880, and Recorded on Page 201 of 1880 Record of Council Proceedings.

To his Honor, Mayor and City Council of the City of Paducah, Ky.

GENTLEMEN: We, the subscribers, humbly petition your Honorable body, for permission to erect poles and run wires thereon throughout your city, for the purpose of establishing a Telephone Exchange, for the convenience of your citizens, trusting that your Honorable body will grant our petition, we are,

Respectfully,

BELL TELEPHONE CO.,
Per W. G. WASHBURN, *Agent*.

"Referred to Street Committee."

Page 203 of Proceedings of Council Meeting, Nov. 15th, 1880.

To the Hon. Mayor and City Council of City of Paducah.

GENTLEMEN: We, your committee, to whom was referred the petition of W. G. Washburn, Agent of Bell Telephone Company, in the matter of erecting Telephone poles throughout the city, would respectfully recommend that said prayer be granted, on the following conditions, viz: the poles not to be less than 35 feet in height, 10 inches in diameter at base and good proportion all the way to the top, to be painted red at the base and white from the red to the top of poles.

E. J. HOLLAN,
W. E. AUGUSTUS,
Committee.

On motion the report was received recommended and concurred in.

- 134 EXHIBIT No. 13 TO DEPOSITION OF JAMES E. CALDWELL.

This agreement made this first day of April, 1887, between the East Tennessee Telephone Company hereinafter called the Telephone Co. and the City of Paducah hereinafter called the lessee. Witnesseth:

First. The Telephone Co. in consideration of the payment which the said Lessee hereby agrees to make to the Telephone Co., of a pole rental charge amounting to One Dollar per annum, payable annually (in advance) hereby grants to the said Lessee the right to attach to, and maintain at its own expense, upon the poles of the Telephone Co., in the city of Paducah, the wires of their Fire Alarm system, together with the necessary insulators and fixtures therefor.

Second. The right of occupancy hereby granted, is to be exercised by the said Lessee, subject to regulations of the Telephone Co.,

and in such manner as shall not conflict with the Telephone Co.'s own use of said poles, nor interfere with the working or use of its wires thereon, and this Agreement shall be terminable at the will of either party at any time hereafter upon thirty days' written notice to the other, of an intention to terminate the same, when said wires and fixtures shall be removed from said poles without delay, at the expense of said Lessee.

Third. The Lessee hereby agrees to allow the Telephone Co. the use of any poles belonging to the said Lessee, upon the same terms as stated above, that the Telephone Co. may need in extending their service, the said Telephone Co. being bound by the conditions of second section.

Fourth. No use of the Telephone Co.'s poles shall, under this lease, however extended, be taken as creating or vesting in said Lessee, any ownership or property in the said poles of the Telephone Co.

135 Fifth. This lease is personable to said Lessee, and is not assignable.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

THE EAST TENNESSEE TELEPHONE CO.,
By N. R. YOUNG, *Gen. Supt.*
CITY OF PADUCAH,
By CHAS. REED, *Mayor.*

136 EXHIBIT No. 14 TO DEPOSITION OF JAMES E. CALDWELL.

Whereas, controversies have arisen and now exist between the City of Paducah on the one hand, and the East Tennessee Telephone Company on the other, with respect to taxes, pole rentals and various other matters; and,

Whereas, litigation is pending between the parties with reference to the matters in dispute; and,

Whereas, it is desired by both parties that all matters of controversy between them be settled and adjusted on an amicable and satisfactory basis;

Be it Resolved, by the General Council of the City of Paducah: That all matters in controversy between the East Tennessee Telephone Company and the City of Paducah relative to franchise, taxes, pole rentals and other matters be, and the same are hereby settled upon the following terms:

The East Tennessee Telephone Company having agreed to pay to the City of Paducah the sum of Three thousand Dollars, in cash, and to purchase a franchise from the City of Paducah, which franchise is to be properly enacted into an ordinance, advertised and sold according to the Constitution and laws of the State of Kentucky, and the City is willing to accept said settlement and receive said money in full settlement and discharge of all penalties, pole rentals and other matters in dispute, up to and including the present year, excepting the present ad valorem tax for the present year which is not yet due,

and which has not been paid, will be paid by the East Tennessee Telephone Company when same becomes due, and with the exception of said ad valorem tax, all matters affecting the interests of said Company with the City are hereby settled and ended.

137 Be it further Resolved: That upon the East Tennessee Telephone Company dismissing its present litigation against the City, the City Attorney is hereby authorized and directed to request the Attorney General of Kentucky to dismiss all litigation instituted by the Commonwealth of Kentucky against the East Tennessee Telephone Company, no penalties or fines to be imposed.

It is further Resolved: That the East Tennessee Telephone Company waives and surrenders any right or claim to any other franchise or right to transact telephone business in the City of Paducah except that which will be conferred upon it by the franchise as passed and sold, as herein above set out.

PADUCAH, KY., Aug. 30th, 1904.

To the Mayor and General Council of the City of Paducah.

GENTLEMEN: The Resolution presented to you, prepared by Mr. Granberry, Mr. Flournoy and ourselves, embodies the terms of settlement exclusive of the provisions of the franchise ordinance agreed on by the City and the East Tennessee Telephone Company, and the passage of the resolution and franchise ordinance above referred to will settle all matters of difference between the City and the Company, and is entirely acceptable to the East Tennessee Telephone Company.

EAST TENNESSEE TELEPHONE COMPANY,
By WHEELER, HUGHES & BERRY.

138 *An Ordinance Creating and Providing for the Sale of a Franchise or Privilege to Establish, Maintain, and Operate a Telephone System in the City of Paducah.*

Be it ordained by the General Council of the City of Paducah, Kentucky:

SECTION 1. That there is hereby established and created a telephone franchise for a period of twenty (20) years from the date the sale of same is ratified, granting the privilege or right to construct, establish, maintain, and operate a telephone system for public and private use in the City of Paducah, Kentucky, including necessary conduits, sub-ways, man-holes, poles, wires, and other equipments, with right of way over, under, along and through the streets, avenues, alleys, squares, bridges and public places in said City for the purpose of running such sub-ways, poles, wires and other equipments necessary to construct, maintain, establish and operate a telephone system in the city of Paducah in accordance with the conditions, terms and limitations of this ordinance; and the purchaser thereof is hereby authorized to construct, own and operate said subways, man-holes, wires and other equipments, and construct, maintain and operate said system.

SECTION 2. The maximum prices authorized to be charged by the purchaser hereof, or its successors or assigns, for telephones shall be as follows: For the first three thousand stations or less, within McCracken County four dollars (\$4.00) per month for a business telephone and two dollars and fifty cents (\$2.50) per month for a residence telephone, and thereafter fifty cents additional per month for each one thousand additional stations or fractional portion thereof, for business telephone, and twenty-five cents per month for a residence telephone.

SECTION 3. The purchaser of said franchise or privilege shall furnish to the City of Paducah twelve (12) telephones free of charge of similar type and equipment as that furnished its patrons in 139 the said City; said telephones to be placed at such places as may be directed by the City officials.

SECTION 4. The City of Paducah shall have the privilege of erecting and maintaining its police and fire alarm wires on the poles of the purchaser of this franchise, but the same shall be erected and maintained in such a manner as not to interfere with the wires and cables of the said purchaser.

SECTION 5. That the poles used by the purchaser of this franchise or privilege shall be reasonably straight, set uniformly, and the work in setting poles shall be under the direction of the Board of Public Works of the City; and all fixtures placed thereon shall be safe and erected in a substantial manner, and shall be as neat in appearance as may be reasonably possible.

SECTION 6. The purchaser of this franchise or privilege hereby agrees to protect the City of Paducah against any loss or any damage to any person or property in consequence of any act or omission of said purchaser, during the construction, maintenance and operation of said telephone plant.

SECTION 7. That the purchaser of this ordinance or privilege shall have the right to sell or transfer the same; but the same shall not be sold to any existing company now or hereafter operating in the City of Paducah, without the consent of the General Council.

SECTION 8. That the purchaser of this franchise or privilege shall pay the expenses incurred in publishing and advertising this ordinance, and the sale to be held thereunder, and the bid of no person, firm or corporation will be entertained or accepted which has not prior to the making of said bid, deposited with the Mayor of the City of Paducah either cash or certified check, for the sum of One hundred dollars (\$100.00) to be forfeited in the event the 140 purchaser declines to comply with the terms of said sale within five days after the ratification of same by the General Council.

SECTION 9. The purchaser of this franchise or privilege its successors or successors in ownership, is guaranteed that during the existence thereof no occupation of license tax shall be imposed upon the owner of the same, in excess of One hundred dollars (\$100.00) per annum. This ordinance shall not release any franchise or ad valorem tax.

SECTION 10. Upon the passage and publication of this ordinance the Mayor is hereby authorized and directed to advertise this fran-

chise or privilege for sale in the official newspaper of the city of Paducah, stating the time and place, and offer for sale this franchise or privilege, and sell same to the highest and best bidder, reporting his action to the next meeting of the General Council.

141 EXHIBIT NO. 15 TO THE DEPOSITION OF JAMES E. CALDWELL.

PADUCAH, KY., Oct. 23rd, 1880.

To the Honorable Mayor and Common Council of the City of Paducah, Ky.:

We, the subscribers, hereby petition your Honorable body for permission to *erect poles* and *run* wires thereon throughout your City for the purpose of establishing a Telephone Exchange for the convenience of your citizens. Trusting that your Honorable body will grant our petition, we remain,

Resp'y,

BELL TELEPHONE CO.,
Per W. G. WASHBURN, *Agt.*

"Referred to street committee."

We, your committee, would recommend that the prayer of the within petitioners be granted on the following conditions, to wit: that said poles shall not be less than 35 feet in height and painted well, the color to be red at base and white from red up, and not less than 12 inches in diameter at base, and in good proportion all the way up.

E. J. HOLLAN.
W. E. AUGUSTUS.

This is to certify that the above is a certified copy of same.

MAURICE McINTYRE,
City Clerk of Paducah, Ky.

142 EXHIBIT NO. 16 TO THE DEPOSITION OF JAMES E. CALDWELL.

PADUCAH, KY., Dec. 18th, 1905.

The following resolution was introduced, to wit:

Be it resolved by the General Council of the City of Paducah that the East Tennessee Telephone Company, are now doing business of the City of Paducah, without license and without authority of law and be it further resolved:

That the Board of Public Works be and is hereby directed to issue to the said East Tennessee Telephone Company no permits to use the streets of Paducah, Ky., for any purpose until said company shall first obtain a Franchise to do business in said City, Paducah, Ky.

On motion said resolution was given its first passage, upon call of the roll by the following vote: Yeas, Ingram, Hill, Gallman, Gilson, Kolb, Katterjohn, McBroom, Oehlschlaeger, Rehkopf, Riglesberger and Taylor (11).

Adopted by Board of Aldermen 21st day of December, 1905.

143 EXHIBIT No. 17 TO DEPOSITION OF JAMES E. CALDWELL.

CITY OF PADUCAH, KY., Dec. 17, 1888.

Member Augustus of the Board of Council, offered the following motion:

Stated that Mr. Harmon was going to take down the Telephone poles on 7th street and remove same to 6th street, and moved that the Mayor and street committee be appointed a committee to arrange with Mr. Harmon for the poles for the City. Motion adopted.

This is to certify that the above is a certified copy of Council proceedings Dec. 17th, 1888, book — page 379.

MAURICE McINTYRE,
City Clerk, City of Paducah, Ky.

144 H. BLAIR SMITH, the next witness called, being duly sworn, deposes as follows:

Direct examination.

By Mr. GRANBERRY, for the Plaintiff:

Q. Mr. Smith, are you the Auditor of the East Tennessee Telephone Company of Kentucky?

A. Yes sir.

Q. That is, the plaintiff in this case?

A. Yes sir.

Q. I will ask you to file, as an exhibit to your deposition a statement of the earnings and expenses and construction account of the Paducah Exchange, for the years 1902 to 1907, inclusive, and mark it Exhibit No. 1.

A. I do so file it, and mark it Exhibit No. 1.

Q. Does that statement also show the number of subscribers on January 1st of each year, those added during the year, those discontinued during the year, and then the average for the year?

A. Yes sir.

Q. Is the exhibit No. 1, correct, and taken from the books under your charge and made up under your direction and supervision?

A. Yes sir.

Q. Mr. Smith, will you file a statement as exhibit to your deposition showing the number of telephones that have been used by the City of Paducah free, as far back as your records go?

A. I will, and mark it Exhibit No. 2.

Exhibit No. 2.

Q. Have you prepared a statement of the privilege, tangible and franchise taxes paid the City of Paducah by the plaintiff company from 1899 to date?

A. Yes sir.

145 Q. Will you attach it as Exhibit No. 3 to your deposition?

A. Yes, I will.

Exhibit No. 3.

Q. Is it correct?

A. It is.

Cross-examination.

By Mr. CAMPBELL, for the defendant:

Q. I notice, Mr. Smith, that you have a privilege tax covered in this statement of \$110.00, purported to be paid on the first day of January, 1908, covering the year 1907. Do your books show that that has been paid?

A. I have the receipt.

Q. Receipt from the Treasurer's office of the City of Paducah?

A. The receipt from the Collector, whoever collects the Paducah taxes. (The witness here produced for the inspection of counsel the license for the year 1907.)

Q. Mr. Smith, did you pay this license tax or privilege tax, as you have it set out in this statement, under the knowledge and impression that the East Tennessee Telephone Company was operating in the City of Paducah under a franchise granted by the City of Paducah?

A. Yes sir.

Q. Did you pay that under advice of counsel?

A. Yes sir.

Q. Who was the counsel that advised you?

A. Mr. Granberry.

Q. Mr. Smith, as a matter of information to me, will you explain in your deposition the items that go to make up the earnings as you have them set out here in three different columns: Rentals, Proportion of tolls earned by Exchange, and Miscellaneous, so that I can understand exactly how you proportion those tolls, and what
146 the revenue is derived from?

A. The Rentals include all revenue derived from the rental of telephones connected with the Paducah, Ky., Exchange; all pay station tolls for local service; rental of private branch exchange instruments—and in fact, everything earned by the exchange, whether on the regular basis or on measured basis, for local service. The proportion of tolls earned by the exchange includes fifteen per cent., as a commission, on all long distance tolls originating in the city of Paducah and its outlying check stations; also all of the revenue from handling long distance business for connecting companies, and the revenue from the telegraph companies for handling messages for them. Miscellaneous revenue includes revenue from advertising on Telephone Directories, and profit on services performed for others, and other miscellaneous items not included in the foregoing.

Q. You say in you- proportion of tolls earned by the Exchange you include 15% revenue derived from outgoing messages on the Paducah exchange?

A. And its check stations, operated by the Paducah exchange.

Q. What do you mean by its check stations?

A. Its toll stations lying outside of the city, for which the city performs the operating.

Q. Who gets the other 85%?

A. The division is made on this basis: we attempt to keep the revenue from the exchange entirely separate from the revenue earned by the toll lines, the investment in the toll lines not being charged to the Paducah exchange. The 15% is arrived at in this statement as being just, for the reason that that is the per cent. that the connecting companies usually settle on. The majority of the contracts which we have with connecting companies specify that the company
147 doing the operating and the collecting will get fifteen per cent. of the originating tolls belonging to the other company.

Q. Then the long distance toll lines used by the East Tennessee Company at Paducah are simply used under contract; they do not belong to them any way?

A. They do not belong to the Paducah exchange.

Q. Do they belong to any exchange?

A. No.

Q. Whom do they belong to?

A. They belong to the East Tennessee Company, the Cumberland Company, and other companies.

Q. As I understand it, Mr. Smith, the 15% is based upon general experience in this department, and not upon any particular experience or investment in the Paducah Exchange, is that true?

A. Fifteen per cent. is the recognized basis for settling long distance tolls, at all exchanges, and not specially at Paducah.

Q. Then that sort of contract prevails generally, with all your exchanges throughout the country?

A. That is the general contract.

Q. Please explain to me the items in the Expense Account. What makes up those six items that you have down there?

A. The general expenses include the pro-rata of salaries paid to the general officers and their office forces; a pro-rata of the rent, light and heat of the general office; a pro-rata of traveling expenses chargeable to the above; also of postage, printing and stationery of the company; total cost of the Paducah Directory, with its pro-rata of the general Directory Department expense; taxes paid to the City of Paducah, and to the State and county, on account of
148 the Paducah exchange; legal expenses directly chargeable to the exchange; and incidental general expenses, including premiums on guaranty bonds, exchange on drafts, checks, collection fees, etc.

Q. How do you pro-rate the proportion of salary to officers and expenses paid by the Paducah exchange of the general office?

A. The general expenses of the company are pro-rated to the exchanges on the basis of maintenance and operating expense at the exchange to the maintenance and operating of the whole company.

Q. Can you explain that more fully by giving an illustration of how that is done?

A. As an example, if the general expenses which cannot be charged direct to the exchanges amount to \$10,000 a year, and the maintenance and operating of the exchanges amount to \$100,000 per year, then the 10% general expenses specified are charged to

the exchange. The figures used are only for the purpose of illustration.

Q. As I understand, from your statement, the general offices, which I take to be the offices here in Nashville, have a certain expense that the offices or telephone exchanges throughout the country that you operate are charged with pro rata?

A. That is a fact.

Q. They pay their pro rata portion of it. Now what I am trying to arrive at is, how do you pro-rate that expense to the Paducah exchange or to any other exchange that you operate, taking your expense in Nashville, at your general offices, to be a fixed sum which you can arrive at, how do you pro-rate that expense to the Paducah exchange?

A. We must first determine the exact amount of general expenses subject to pro-rate; we must then determine the amount of operating and maintenance expenses at the exchange to be charged with.
149 this proportion of the general expenses, and charge that proportion of general expenses which the total general expense of the company bears to the total operating and maintenance expenses of the company.

Q. Now that system prevails equally with all of the companies operated by you or by your company?

A. Yes sir, by all the exchanges operated by our company.

Q. They pay their equal pro rata, according to their expenses, after deducting the fixed expenses of the local exchanges?

A. Yes sir.

Q. Explain the other item?

A. Operating Expense includes a portion of the salaries and wages of the District Superintendent, together with the total salaries of the chief operator, supervisors and operators; the exchange clerical force; also pay-station commissions; 2nd, the proportion of the rent of the building for operating purposes; and light and heat used for like purposes. It includes the expense incurred for soliciting new stations, and for advertising for new business; and incidental expenses, for laundry, ice, towel supplies, and supplies for the comfort of operators. Maintenance is the current repair account, and represents the cost of keeping the existing property in good working condition, including the replacement of those parts of the property whose normal life is about one year. And it includes a part of the salary of the Manager, or the local wire chief; the salaries of foremen, linemen, inspectors, equipment men, ground men, and laborers engaged in current repairs on the property; a proportion of the rent of the building; all material used for current repair purposes, together with freight and cartage; electrical current for storage batteries; traveling expenses of employees for the purpose of current repair; premiums paid for fire insurance; sums paid as compensation for injuries to persons, and for damages to property,
150 and incidental items incurred for maintenance purposes and to be used by maintenance employees.

Q. Now you state in that, that the salaries of linemen and the line chief—is that what you call him?

A. Yes, we have line chiefs.

Q. Are charged to maintenance: now let me ask you if your company was doing some original construction work, putting in new line of wires, poles, and adding that much tangible property to the local exchange, would the salaries of the line men making this construction be charged to the maintenance account?

A. They would not; they would be charged to the Construction account—Re-construction: This account represents the expense of replacing portions of the plant the normal life of which exceeds one year. Reconstruction is charged with the cost of the property reconstructed, and credited with salvage, if any. Depreciation: this account represents the amount set aside from the gross earnings of the company as a reserve to meet the latent decay of the plant, also its destruction by storms, fires, or earthquakes; also to insure against the various apparatus becoming obsolete before worn out. Depreciation and reconstruction are estimated to require annually $7\frac{1}{2}\%$ of the total of the construction. Depreciation reserve is credited with the $7\frac{1}{2}\%$ less the amount actually expended during the year on reconstruction.

Q. That $7\frac{1}{2}\%$ is I presume based upon the experience that the company has had in estimating these amounts heretofore?

A. Depreciation is a much debated subject. The commission of three engineers appointed by the City Council of Chicago to make a thorough investigation of the Chicago Telephone Company's plant in Chicago, after a most exhaustive study authorized 8.03 per cent. as a proper depreciation charge. We have affidavits from

151 telephone engineers specifying that as high as 10 or 12 per cent. is considered legitimate. It is impossible for any one to determine precisely the per cent. required for depreciation. This company uses $7\frac{1}{2}\%$, believing this to be ample and legitimate.

Q. Instrument Rental.

A. This is the sum paid to the American Bell Telephone Company, under contract, and represents four and a half per cent. of the gross earnings of the instruments rented. For this rental we not only get use of all the receivers and transmitters used in the exchange, but also get, without additional charge, the expert services of the Engineering Department of the American Telephone and Telegraph Company, and the use of patents belonging to that company.

Q. I notice by your statement that in the year 1907, you had an average of 2917 subscribers, and you paid \$2963.00 for those instruments used by those 2917 subscribers, or an average of about \$1.00 an instrument?

A. Per set.

Q. A dollar a subscriber for the necessary instruments to be used?

A. Yes sir.

Q. Can you give me the cost of those instruments, what they are worth?

A. They cost about three dollars a set.

Q. Then you pay about $33\frac{1}{3}\%$ to the American Bell Telephone Company in rentals?

A. Yes; but bear in mind, that the depreciation on those instruments is very rapid, and they are easily broken, and are treated carelessly by the subscribers, which costs the company nothing to replace broken, worn out or defective instruments.

152 Q. The item here which shows Balance of Revenue, when marked in green ink shows the earnings and when marked in red ink in shows a loss.

A. The green ink shows the average earnings and the red ink shows the loss and average loss.

Further this deponent saith not.

H. BLAIR SMITH.

Subscribed and sworn to before me this 26th day of August, 1908.

W. OTHO BEALL,
Notary Public.

My commission expires January 17th, 1912.

Bill of Costs.

Notary fees for 2 depositions.....	\$2.00
Stenographer's fees, for Transcript of depositions, 54 fol. at 10¢	5.40
Total	\$7.40

Paid by the East Tennessee Telephone Company.

W. OTHO BEALL,
Notary Public and Stenographer.

My commission expires January 17th, 1912.

(Here follows statement for years 1902 to 1907, marked page 153.)

	EARNINGS:
	Rentals,
	Proportion of Tolls Earned by Exc.
	Miscellaneous,
	Total,
	EXPENSES:
	General,
	Operating,
	Maintenance,
	Reconstruction
	Depreciation,
	Instrument Rental,
	Total,
	Balance of Revenue,
	Construction Jan. 1st,
	Average Con. for year,

EXCHANGE Paducah, Ky

	1902	AVERAGE PER SUB.	1903	AVERAGE PER SUB.	1904	AVERAGE PER SUB.	1905	AVERAGE PER SUB.	1906	AVERAGE PER SUB.	1907	AVERAGE PER SUB.	1908	AVERAGE PER SUB.	1909	AVERAGE PER SUB.
AS:																
of Tolls	2656563	2138268003	20843979925	21074861917	21026131324	20876249499	2142									
by Exc.	205926	165340618	217391559	207434044	188427275	145462078	158									
ous,			28747	1567873	2982774	28103336	36									
	2862489	22913608621	23014400231	2329363834	23196641373	22606814913	2336									
AS:																
	402716	323493478	314064729	558563644	244857064	2921184909	487									
	599431	480979432	624203442	637643007	7102064595	702865580	639									
ce,	1296734	1040674902	4301165135	617867297	378167172	397376588	472									
ction			282130	149443115	191312814	447887575	304									
on,	203407	163211402	773825200	4371292420	559907494	3091569741	538									
et	128812	103162388	104196717	104236637	102295137	100296370	101									
	2631100	2108521602	2245727363	2508046120	21826604276	22477180765	2461									
	231389	18787019	5627122	173317714	13737097	13365850	125									
on	6800888	6059503228	68914007718	83581965165	93976315757	101082892445	10505									
ar,	8152058	11755470	16986442	23140461	29604101	32764222										
et Rev	283	74		137	125											
ment,	1124	1379	1676	2126	2604	3131										
ing	558	1047	1032	1059	1815	551										
ed	303	700	582	581	1288	966										
ar,	1247	1568	1889	2313	2938	2417										
ted,																
lines, in red, not included in total.																

Exhibit #1
to description of
H. Blair Smith

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154 EXHIBIT NO. 2 TO DEPOSITION OF H. BLAIR SMITH.

Telephones Furnished the City of Paducah, Kentucky, Free, August 1st, 1908.

Circuit number.	Name.	---Period of free service---	
		Commenced.	Discontinued.
2	City Hall.....	x	Feb. 7, 1908
95	Fire Department #1.....	x	" 7, 1908
181	City Hospital.....	x	" 7, 1908
219	City Power House.....	o	" 7, 1908
325	City High School.....	o	" 7, 1908
587	Oak Grove Cemetery.....	o	" 7, 1908
717	City Mayor's Office.....	Jan. 2, 1902	" 7, 1908

x Began about the date the exchange was opened.

o Began prior to January 1st, 1897.

Telephones, Paducah, Ky., for the Year 1887.

	Number of telephones.
April 1st, 1887.....	87
July 1st, 1887.....	85
October 1st, 1887.....	88
December 31st, 1887.....	86
Number of telephones, December 26th, 1905.....	2576

155 EXHIBIT NO. 3 TO DEPOSITION OF H. BLAIR SMITH.

Statement of Privilege, Franchise, and Tangible Taxes Paid the City of Paducah, in McCracken County, Kentucky, by the East Tennessee Telephone Company from 1899 to Date.

Privilege.		
Date paid.	Year covered.	Amount.
4/7/05.....	1905	\$110.00
1/1/08.....	1907	110.00
		<hr/> \$220.00
Franchise.		
3/ 9/00.....	1899	\$101.78
6/26/01.....	1900	101.50
3/ 1/07.....	1901	19.42
3/ 1/07.....	1902	61.22
3/ 1/07.....	1903	46.61
3/ 1/07.....	1904	119.13
3/ 1/07.....	1905	256.60
3/ 1/07.....	1906	489.06
1/ 1/07.....	1907	430.12
		<hr/> 1,625.44

85

Tangible.

6/30/99.....	1899	91.00
6/21/00.....	1900	112.50
6/20/01..... (1/2).....	1901	123.25
6/24/02.....1st installment	1902	467.13
10/ 1/02.....2nd installment	1902	282.12
6/19/03.....1st installment	1903	330.00
10/15/03.....2nd installment	1903	330.00
6/10/04.....1st installment	1904	330.00
11/14/04.....2nd installment	1904	330.00
7/ 1/05.....1st installment	1905	370.00
11/ 2/05.....2nd installment	1905	370.00
6/ 1/06.....1st installment	1906	660.00
11/ 1/06.....2nd installment	1906	660.00
6/ 1/07.....1st installment	1907	933.35
11/ 1/07.....2nd installment	1907	933.30
6/ 1/08.....1st installment	1908	933.80
		<hr/> 7,276.45
		<hr/> \$9,121.89

August 4th, 1908.

Received from P. O. and filed Sept. 19, 1908.

J. R. PURYEAR, *Clerk*.

- 156 Deposition of ROBERT W. DEVONSHIRE, of Boston, Massachusetts, taken at the Hoffman House in the City of New York, State of New York, on the Fifth Day of October, Nineteen Hundred and Eight, in Behalf of the Complainant to be Read as Evidence in an Action now Pending in the United States Circuit Court for the Western Division of Kentucky at Paducah, wherein the East Tennessee Telephone Company is Complainant and the City of Paducah, Kentucky, is Defendant.

And by agreement of Counsel for Complainant and for Defendant the deposition of the witness is taken stenographically, and notice of the time and place thereof is waived. The witness, it is agreed, may sign the stenographic notes and when transcribed the name of the witness shall be signed to the notes as transcribed by the officer taking the same to have the same force and effect as though read and subscribed by him at the time of taking. It is further agreed that no commission need be issued for the taking of said brief nor commissioner named to take the same. All formalities are waived and no objection it is agreed to be made to said brief except for relevancy or competency.

The witness being duly sworn is examined by Solicitor for the Complainant:

Q. State your name, age, residence and occupation.

A. Robert W. Devonshire, my age is 54, residence Boston, Massa-

chusetts, and occupation General Manager of American Bell Telephone Company.

Q. How long have you been connected with the American Bell Telephone Company?

A. Since its organization and companies preceding.

Q. Please state the date of its organization and the companies preceding it.

A. I do not remember. As a matter of fact I have been in the service of the Company since August, 1877.

157 Q. Who has charge of, or in whose custody are the records of the American Bell Telephone Company.

A. Directly, Mr. C. P. Ware.

Q. What connection, if any, have you with the records.

A. The Boston office is practically under my direction.

Q. Do the records in your office show any contract that ever existed between the National Bell Telephone Company, a corporation that existed under the laws of the state of Massachusetts and James M. Ormes, of Richmond, Virginia, and Henry H. Talmadge, of Washington, D. C.?

Objected to by Solicitor for respondent because the question asked is not concerning matters relevant to the issue, and because witness has not properly qualified himself to testify thereto.

A. They do.

Q. What connection if any did the National Bell Telephone Company have with the American Bell Telephone Company?

Objected to by Solicitor for respondent.

A. The National Bell Telephone Company is the predecessor of the American Bell Telephone Company.

Solicitor for respondent moves to strike answer of witness from the record, because same is not relevant to the issue.

Q. Will you please file and make a part of your deposition a copy of the contract between Ormes and Talmadge and the National Bell Telephone Company?

A. I will, and herewith file the same, marking it "Exhibit A."

Solicitor for respondent objects to the filing of the Exhibit referred to, because same is not relevant to the issue, and because same is not the original.

Q. Do you know of your personal knowledge that the contract which you have filed is a duplicate of an original on file in your office?

158 A. I do.

Solicitor for respondent objects to question and answer thereto.

Q. Please state if there exists a contract between the National Bell Telephone Company, the American Bell Telephone Company, James M. Ormes, Henry H. Talmadge and the East Tennessee Telephone Company, of date November 16th, 1880.

Solicitor for respondent objects.

A. Yes.

Q. Where is the original contract?

A. In the office at Boston.

Q. Under whose control.

A. Mr. C. P. Ware's.

Q. Who has the custody and access to that contract in Boston?

A. Mr. C. P. Ware.

Q. Have you any custody or control thereover?

A. I have, as General Manager.

Q. Will you please file a copy of the contract mentioned as a part of your deposition, marking same for identification?

A. I will, and herewith file same marking it "Exhibit B."

Solicitor for respondent objects to the filing of this copy because witness has not qualified himself to do so, and because same is not the original.

Q. State whether or not there exists a record in the office of the American Bell Telephone Company at Boston of a contract known as the "Contract for Exchanges," Form 109 C, entered into on the 16th day of November, 1880, between the American Bell Telephone Company and the East Tennessee Telephone Company of New York?

A. There is.

Q. Where is the original contract?

A. In the office of the American Bell Telephone Company in Boston.

159 Q. Is this the office of which you are General Manager and over which you have control?

A. Yes, sir.

Q. Will you please file a copy of such contract with your deposition, marking it for identification, and making the same a part of your deposition?

A. I will, and herewith file same, marking it "Exhibit C."

Solicitor for respondent objects to filing of the exhibit referred to.

Q. State if you know if there exists a contract known in your office as "Contract for Exchanges," Form 109 D, executed on the 21st day of June, 1881, between the American Bell Telephone Company and the East Tennessee Telephone Company of the State of New York.

A. There is.

Q. Will you please file a copy of such contract with your deposition as a part thereof, marking same for identification?

A. I will, and herewith file same marking it "Exhibit D."

Solicitor for respondent also objects to filing of this Exhibit.

Q. State whether or not there exists a contract now in the office of the American Bell Telephone Company in Boston, of which office you are General Manager, and which contract is under your control, entered into between the American Bell Telephone Company and the East Tennessee Telephone Company of Kentucky of date November 24th, 1887.

A. Yes.

Q. Will you please file a copy of such contract and of Exhibits referred to therein as a part of your deposition, marking the same properly for identification.

A. I will, and herewith file same marking it "Exhibit E."

Solicitor for respondent objects also to filing of this Exhibit.

160 Q. State if you know if the contracting parties mentioned in the contracts about which you are deposing have acted under and recognized the existence of the contracts you have filed with your deposition.

Objected to.

A. Yes.

Cross-examination.

By SOLICITOR FOR DEFENDANT:

Q. Mr. Devonshire, can you give me in a general way what your duties are as General Manager of the American Bell Telephone Company.

A. Broadly speaking, in charge of the Boston office and issuing out contracts.

Q. You have heads of various departments in the Boston office, have you not?

A. I do.

Q. What is the department called in which you keep your contract files?

A. Secret archives.

Q. Do you have a head for that department?

A. Yes.

Q. Who is the head of that department?

A. Mr. C. P. Ware.

Q. Is he employed by you or by the American Bell Telephone Company?

A. He is employed by the American Bell Telephone Company.

Q. Do you know anything personally about the relationship between the American Bell Telephone Company and the East Tennessee Telephone Company of either New York or Kentucky except such information as you may have in your files in Boston?

161 A. No.

Q. Was there ever a Telephone Company, with which you were connected, known and operating under the corporate name of the Bell Telephone Company?

A. Yes.

Q. Where and when were you connected with that Company?

A. Both in Boston and New York, if my memory serves me.

Q. In what way was the Bell Telephone Company connected with, if at all, the American Bell Telephone Company?

A. It was one of the predecessor companies.

Q. When did the Bell Telephone Company go out of existence?

A. I could not say.

Q. Well, was it before or after the American Bell Telephone Company was organized?

A. I could not answer that question.

Q. At the time of the making of the contract you have referred to in 1880 between the East Tennessee Telephone Company of New York and the American Bell Telephone Company, was the Bell Telephone Company the owner of any Exchange rights, patent rights or franchise rights in the State of Kentucky or the County of McCracken, Kentucky?

A. No, sir.

Q. Did the Bell Telephone Company have a right to enter into any franchise contract or patent right contract with any other company for the State of Kentucky at that time?

A. You mean the question just as you put it—yes.

Q. Did you ever hear of a man or know a man by the name of W. G. Washburn?

A. No, sir.

Q. In what capacity were you connected with the Bell Telephone Company?

A. As Chief Clerk.

162 Redirect:

Q. At the time of the execution of the original contract referred to in this deposition as "Exhibit A" between the National Bell Telephone Company and Ormes and Talmadge, what Company, if you know, owned all of the rights of predecessor companies?

A. The National Bell.

Recross-examination:

Q. The National Bell Telephone Company and the American Bell Telephone Company are or were two distinct corporations, were they not?

A. Yes, sir.

(Signed)

R. W. DEVONSHIRE.

STATE OF NEW YORK,
County of New York, ss:

I, V. Bigelow, a Notary Public in and for the County and State of New York, hereby certify that the foregoing deposition of Robert W. Devonshire was taken before me at the time and place mentioned in the caption; that the witness was duly sworn before depositing by me to speak the truth, the whole truth and nothing but the truth; that the answers and questions were written by me stenographically, by agreement of Counsel, and the witness in my presence signed the stenographic notes; that I have truly and correctly transcribed the questions and answers thereto; that the Complainant was present by Counsel and the Defendant was likewise present by Counsel.

My commission as Notary Public expires on the 30th day of March, 1910.

Given under my hand and seal of office this sixth day of October,
A. D., 1908.

[SEAL.]

V. BIGELOW,
Notary Public #88, N. Y. Co.

Notary fees \$11.25.

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Copy.

Contract for Exchanges.

Form 109 B.

This Agreement, made this Thirtieth day of April A. D. 1880, by and between the National Bell Telephone Company, a corporation created under the laws of the State of Massachusetts, Lessor and Licensor, party of the first part, and James M. Ormes of Richmond, Virginia, and Henry H. Talmadge of Washington, District of Columbia, doing business under the firm name of Paducah Bell Telephone Company, Lessee and Licensee (hereinafter called the "Exchange"), party of the second part, Witnesseth:

(1) Whereas, the Lessor owns the Letters Patent of the United States granted to Alexander Graham Bell, March 7, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas, the Lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of a telephonic district or exchange system established and owned by it in the territory hereinafter described under the provisions hereinafter set forth: now it is agreed as follows:

(2) The rights hereby granted shall remain in force until the first day of May A. D. 1885, unless sooner determined as hereinafter provided, and shall extend to all exchanges established and owned by the Licensee within the present municipal limits of the City of Paducah in the county of McCracken, and State of Kentucky, and within a radius of five (5) miles in the State of
164 Kentucky from the Post Office in said City, but this contract shall not take effect unless the second party shall establish an exchange within three months from the date hereof.

(3) For the purpose of this contract, a telephonic exchange system means a system, entirely within said territory, in which different circuits are connected with a central or branch office of the Exchange, attended by an agent of the Exchange, for the purpose of placing subscribers or other parties by such circuits in telephonic communication with such central or branch exchange office, or with

each other, either directly or through the agents of the system. No office or line of an exchange can be connected with any point outside of said territory, nor with any telegraph company's office or line, except by lines of the Licensor or parties specially designated by it for this purpose, and no telegraph company, unless specially permitted by the Licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers.

(4) The Licensor, at its general office or factory, will deliver to the Exchange, as needed, electric speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the Exchange during the continuance hereof shall be deemed to be furnished hereunder, unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the Exchange may choose from among such standard patterns. Each of said telephones shall remain the property of the Licensor, and is hereby leased, and the use of it licensed for the purposes herein declared for the term of one year from the day

when rent and royalty begins to accrue on it as provided in 165 Article 8, but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year, by the Exchange and those using the telephone under it, shall ipso facto operate to renew the lease and license for another year, and so on until the expiration or other determination hereof; in no case, however, beyond the term defined by Article 2. The Exchange is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use them in connection with the trunk lines reserved to the Licensor by Article 9, for the purposes and to the extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the Licensor and as the provisions hereof are not violated, but not longer or otherwise, and it may grant said right to its customers by contracts as provided in Article 7. The Lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the Exchange hereunder exist; but the Exchange shall, by general or special exchanges, supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specifically granted remain to the Licensor.

(5) The Lessor will license, to be used with such telephones, the inventions in call bells, switches, switchboards, and other apparatus needed for such telephone lines, which it can so license, upon such royalties as it may from time to time establish, not greater than those fixed for others under similar circumstances. The Exchange may enjoy any rights of way and similar franchises to maintain said lines which the Lessor can permit it to use, when and so long as, in the judgment of the Lessor, it shall not interfere with the Les-

133 sor's enjoyment thereof, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. For trunk lines from the exchange offices to extra-territorial points and to telegraph offices, the Lessor may, without further compensation, enjoy all rights of the Licensee to erect and maintain lines, and may use its poles and fixtures, but shall pay a pro rata share of the cost of erecting and maintaining them.

(6) The Lessee admits the validity of all patents relating to telephony and telephonic appliances now or hereafter held by the Licensor or under which it may hold licenses exclusive in their character, and the validity of its title thereto, and will not dispute the same, nor make, use or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

(7) The contract between the Exchange and those who are to use telephones under it shall express in such form as the Lessor shall from time to time approve, that the telephone is the property of the Licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is an injury to and invasion of the rights of the Licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction, and other legal redress, in a suit by it in its name and behalf. The Exchange shall require every person using said telephones for communications or messages sent or to be sent over other telephone or telegraph lines, to provide for payment of tolls thereon, and to make every such message subject to such stipulations, regulations, and conditions respecting the liability of such lines for errors and mistakes as the Licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts, 167 to be agreed to by the subscriber and customer, as the Licensor may from time to time approve, and will hold the Lessor harmless from all loss and expense consequent upon its failure so to do.

(8) The Exchange shall charge its subscribers such rental and royalty for the telephones as the Licensor may fix from time to time, for this and other like exchanges, and also in addition a sum not exorbitant nor unusual for the use of call bells, batteries, wires and other appliances, and for services furnished or performed, and may collect both of said sums for a period not exceeding one year in advance. It will make such reports, giving such information regarding the operations of the Exchange and its prices charged as the Licensor may from time to time request. It shall pay to the Licensor a rental and royalty at the rate per instrument of Seventy (70) per cent of the telephone rental and royalty fixed as above (being a discount of thirty (30) per cent) to commence on each telephone on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licensor's office, on

the tenth day of each month up to the last day of the same month. Until otherwise fixed, the rates shall be as follows:

Battery transmitter, each instrument per year. \$10
 Magneto-telephone, each instrument per year. \$10

Upon each instrument unlawfully detained from the Lessor, the Exchange shall pay ten dollars per month until satisfactory proof of its destruction be furnished; shall pay five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall pay the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its use, nor satisfy any
 168 other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

(9) The Licensor may enter the offices and connect with the exchange system any lines to extra-territorial points and to telegraph offices, in order to establish communication between customers of the Exchange and telegraph companies or parties reached by said lines, and may there operate said lines with suitable appliances; the Exchange will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch-board or other connections for direct communication, as may be requested, and in such manner, not inconsistent with the proper conduct of its office, as the Licensor shall direct. But if the Licensor is not satisfied with the manner in which it is performed, it may establish its own offices and trunk and radiating lines for this purpose. The Exchange will not, without special leave of the Licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations or news for sale or publication, nor any communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the Exchange to transmit such messages over such lines. The Exchange will turn over and deliver to the Licensor and such parties as it may from time to time appoint, exclusively, all messages for electrical transmission to points outside said territory, collected by or coming on the wires or within the control of said Exchange, where the Licensor or such party has wires and will transmit the same, so far as the Exchange can lawfully control
 169 the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the Licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall establish, and shall exhibit its accounts and the tickets from which they are

made, so far as may be proper to verify the same. In respect of all the business provided for by this section, the Exchange shall make the following charges and none others: To its own subscriber or customer sending, the same that is made, if any, for an ordinary connection, communication, or message; to the Lessor, upon communications passing over its extra-territorial lines fifteen (15) per cent of the gross tolls charged for each, but not to exceed five (5) cents for any one message or communication occupying not more than five minutes, and upon messages to be forwarded by telegraph, twenty-five per cent of any commission received from any telegraph company (the rest of such commission to belong to the Lessor); to the receiver, nothing; for delivering a telegraphic message to a customer, it may use such line to the telegraph office and may charge the telegraph company such sum as it and such company may agree. The Licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

(10) If the Exchange shall fail to pay any sums due hereunder for thirty days after the same shall become payable, or shall violate any other terms or conditions of this contract, and shall persist in such default, violation, or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the Licensor, or shall become bankrupt or insolvent, the Licensor

170 may, if it shall so elect, by a written notice to the Exchange (or those in charge of its principal office), terminate all rights granted by the Licensor hereunder, and thereupon may by its agents sever the circuit on which any telephone is placed, and take possession of and remove the telephone, and for that purpose may enter the premises of the Exchange and all persons claiming under it; or it may collect, from any sub-lessee or subscriber, all sums then or thereafter due to it or to the Exchange for the use of any instruments, circuits, and appliances, or under any subscription contract; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephones any subscriber or other person in actual possession, and collect from him such sums as may then and thereafter be or become due for the use of the telephone and exchange lines, appliances, and services, and for that purpose shall be entitled to and may take possession of all the lines, fixtures, apparatus, appliances and premises of the Exchange used for carrying on its business, and occupy and operate the same in connection with said telephones and those of additional customers as an exchange, or connect such lines with an office of its own for that purpose; the Licensor shall have the like right upon and within three months after the termination of the rights of the Exchange hereunder by efflux of time or otherwise; and may enforce these provisions by an entry, without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor (and others permitted by it) in the use of said telephones, lines, switch-boards and appliances. The property so taken, and which does not belong to the Lessor or revert to it hereunder, may be returned within three months from the taking, in

which case it shall pay to the Exchange a reasonable compensation for its use, or the Lessor may retain the same as its own property and shall pay therefor a reasonable price (not exceeding the actual cost) within four months after the taking, and shall account to the Exchange for all sums collected which accrued before the Licensor became so entitled to possession, deducting all expenses incident thereto, and all that may be done to it. The Lessor also reserves all its rights and remedies in law and in equity, under the patent laws or otherwise, including the remedy by injunction against the Exchange or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. If several exchange systems are established hereunder, these rights and remedies of the Lessor shall, in case of any default, apply to all such systems or to one alone at its option. The Lessor may also use the name of the Exchange to protect its interests and to enforce its rights hereunder, and the Exchange shall execute assignments in accordance herewith.

(11) This contract is personal to the second party herein named, and any assignment or attempt to assign it, or the rights granted or lines established hereunder, by act of the party or operation of law, without the written consent of the Licensor, will be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by said party, or by their executors or administrators, to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The party of the second part promises that they will keep and observe all the stipulations herein contained on their part to be kept and performed. Whenever the Licensor grants to others the rights for connecting lines or any other rights remaining to it, the stipulations hereof relating thereto shall be binding upon and enure to the benefit of such grantees, and the Licensor shall not be responsible for their acts or defaults. If the Licensor shall transfer to any party who shall agree to perform the stipulations hereof, its title to the telephones hereby leased and the patent rights under which they are licensed, and its then existing interests hereunder, it is agreed that the provisions hereof enure to the benefit of and are binding upon such party in respect of all things done or to be done after such assignment, as if it were named a party hereto, and this said National Bell Telephone Company shall no longer be responsible hereunder.

The Licensee also agrees that it will not allow any telegraph company to use or to have any rights, on poles or other structures leased or put up by, or belonging to or under the control of said Licensee, without the written assent of the said National Bell Telephone Company.

Signed in duplicate on the day first above written.

THE NATIONAL BELL TELEPHONE CO.,

By its General Manager,

(S'd) THEO. N. VAIL.

(S'd) O. E. M.

[Seal T. N. B. T. C.]

In presence of

(S'd) C. EMERSON,

As to signature- of T. N. Vail
and W. H. Forbes.

Approved:

(S'd) W. H. FORBES, *Pres't.*

(S'd) JAMES M. ORMES.

(S'd) HENRY H. TALLMADGE.

(S'd) SAM H. COCHRAN,

As to James M. Ormes, and

(S'd) J. H. REISS.

"A," R. W. Devonshire.

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Copy.

This Agreement made this Sixteenth day of November A. D. 1880 by and between the National Bell Telephone Company a corporation created under the laws of Massachusetts, the American Bell Telephone Company a corporation created under said laws, James M. Ormes and Henry H. Tallmadge doing business under the several firm names hereinafter mentioned and the East Tennessee Telephone Company a corporation organized under the laws of the State of New York witnesseth:

Said National Bell Telephone Company made with said Ormes and Tallmadge doing business under the firm name of the East Tennessee Bell Telephone Company two (2) license contracts for the use of telephones for Exchanges in Knoxville and Chattanooga respectively in the State of Tennessee both dated April 30th, 1880; also with the same persons doing business under the firm name of the Frankfort Bell Telephone Company a license contract for the use of telephones for an Exchange in Frankfort in the State of Kentucky dated April 30th, 1880; also with the same persons doing business under the firm name of the Paducah Bell Telephone Company a license contract for the use of telephones for an Exchange in Paducah in the State of Kentucky dated April 30th, 1880; also with the same persons doing business under the firm name of the Lexington Bell Telephone Company, a license contract for the use of telephones for an Exchange in Lexington in the State of Kentucky dated June 26th, 1880.

Said American Bell Telephone Company has acquired the title to all the telephones licensed by the National Bell Telephone Company and all the right, title and interest of said National Bell Telephone Company in, to and under all of said contracts

Said Ormes and Tallmadge have transferred all their
174 business and plant in the several territories covered by said contracts to said East Tennessee Telephone Company which corporation has taken a license contract for the use of telephones for Exchange purposes, from the American Bell Telephone Company of even date herewith.

Now it is agreed as follows:

As from the date hereof said East Tennessee Telephone Company takes possession of all the telephones furnished to said Ormes and Tallmadge under said contracts or any of them and hereafter holds them and all sub-lessees hold them as the property of said American Bell Telephone Company under said license to said East Tennessee Telephone Company of even date herewith and with the same effect as if they had been actually furnished thereunder.

Said five (5) license contracts to said Ormes and Tallmadge are hereby terminated and surrendered to said American Bell Telephone Company except that said American Bell Telephone Company saves and reserves its rights to collect back rentals and royalties under said contracts and except also that the rights of subscribers to said Exchanges under existing contracts made in pursuance of said license contracts are saved and said East Tennessee Telephone Company hereby assumes and agrees to carry out said contracts with subscribers.

NATIONAL BELL TELEPHONE CO.,

(S'd) By W. H. FORBES, *Pres't.*

[SEAL.] (S'd) O. E. M.

In presence of

(S'd) C. EMERSON,

As to both signatures of W. H. Forbes.

AMERICAN BELL TELEPHONE CO.,

(S'd) By W. H. FORBES, *Pres't.* [SEAL.]

JAMES M. ORMES,

(S'd) By D. I. CARSON, *Att'y.*

(S'd) HENRY H. TALLMADGE.

EAST TENNESSEE TELEPHONE

CO.,

(S'd) By CLARENCE CAREY, *Vice Pres't.* [SEAL.]

(S'd) D. I. CARSON, *Sec'y.*

THOMAS O. BELL,

Witness as to signatures of H. H. Tallmadge,
Clarence Carey, D. I. Carson, & James M.
Ormes, by D. I. Carson.

"B." R. W. DEVONSHIRE.

This Agreement, made this Sixteenth day of November, A. D. 1880, by and between the American Bell Telephone Company, a corporation created under the laws of the State of Massachusetts, Lessor and Licensor, party of the first part, and The East Tennessee Telephone Company, a corporation created under the laws of the State of New York, Lessee and Licensee, (hereinafter called the "Exchange") party of the second part,

Witnesseth: (1) Whereas, the Lessor owns the Letters Patent of the United States granted to Alexander Graham Bell, March 7, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas the Lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of a telephonic district or exchange system established and owned by it in the territory hereinafter described under the provisions hereinafter set forth: now it is agreed as follows:

(2) The rights hereby granted shall remain in force until the first day of June, A. D. 1885, unless sooner determined as hereinafter provided, and shall extend to all Exchanges established and owned by the Licensee within the present municipal limits of each of the cities named as Exchange Districts in Schedule "A" hereto annexed and made a part of this contract; with the same effect as if a separate contract in the same words as this were made for each of said Exchanges, and the Exchange territory hereinafter referred to shall be taken to mean for each of said Exchanges the limits of its own municipality, but this contract shall not take effect unless the second party shall establish an exchange on or before December 1st, 1880, in each of said cities.

(3) For the purpose of this contract, a telephonic exchange system means a system, entirely within said territory, in which different circuits are connected with a central or branch office of the Exchange, attended by an agent of the Exchange, for the purpose of placing subscribers or other parties by such circuits in telephonic communication with such central or branch exchange office, or with each other, either directly or through the agents of the system. No office or line of an Exchange can be connected with any point outside of said territory, nor with any telegraph company's office or line, except by lines of the Licensor or parties specially designated by it for this purpose, and no telegraph company, unless specially permitted by the Licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers.

(4) The Licensor, at its general office or factory, will deliver to the Exchange, as needed, electric speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the Exchange during the continuance hereof shall be deemed to be furnished hereunder unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the Exchange may choose from among such standard patterns. Each of said telephones shall remain the property of the

177 Licensor, and is hereby leased, and the use of it licensed under said patents and all others under which the Lessor has or may have a right to license, so far as applicable thereto, for the purposes herein declared for the term of one year from the day when rent and royalty begin to accrue on it as provided in Article 8, but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year, by the Exchange and those using the telephone under it, shall ipso facto operate to renew the lease and license for another year, and so on until the expiration or other determination hereof; in no case, however, beyond the term defined by Article 2. The Exchange is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use them in connection with the trunk lines reserved to the Licensor by Article 9, for the purposes and to the extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the Licensor and as the provisions hereof are not violated, but not longer or otherwise; and it may grant said right to its customers by contracts as provided in Article 7. The Lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the Exchange hereunder exist; but the Exchange, shall, by general or special exchanges, supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specially granted remain to the Licensor.

(5) The Lessor will license, to be used with such telephones, the inventions in call bells, switches, switch-boards, and other apparatus needed for such telephone lines, which it can so license, upon such royalties as it may from time to time establish, not greater than those fixed for others under similar circumstances; but such call-bells, switches, switch-boards and other apparatus shall be
178 used only with telephones licensed by Lessor, and the Exchange agrees not to use them otherwise nor to dispose of them to any one except those so licensed, or to licensed manufacturers of the Lessor. The Exchange may enjoy any rights of way and similar franchises to maintain said lines which the Lessor can permit it to use, when and so long as, in the judgment of the Lessor, it shall not interfere with the Lessor's enjoyment thereof, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. For trunk lines from the exchange offices to extra-territorial points and to telegraph offices, the Lessor may, without further compensation, enjoy all rights of the Licensee to erect and maintain lines, and may use its poles and fixtures, but shall pay a pro rata share of the cost of erecting and maintaining them.

(6) The Lessor admits the validity of all patents relating to telephony and telephonic appliances now or hereafter held by the Licensor or under which it may hold licenses exclusive in their character, and the validity of its title thereto, and will not dispute the

same, nor make, use or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

(7) The contract between the Exchange and those who are to use telephones under it shall express in such form as the Lessor shall from time to time approve, that the telephone is the property of the Licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is an injury to and invasion of the rights of the Licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction, and other legal redress, in a suit by it in its name and behalf. The Exchange shall require every person

179 using telephones for communication or messages sent or to be sent over other telephone or telegraph lines, to provide for payment or tolls thereon, and to make every such message subject to such stipulations, regulations and conditions respecting the liability of such lines for errors and mistakes as the Licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts, to be agreed to by the subscriber and customer, as the Licensor may from time to time approve, and will hold the Lessor harmless from all loss and expense consequent upon its failure so to do.

(8) The Exchange shall charge its subscribers such rental and royalty for the telephones as the Licensor may fix from time to time, for this and other like exchanges, and also in addition a sum not exorbitant nor unusual for the use of call-bells, batteries, wires, and other appliances, and for services furnished or performed, and may collect both of said sums for a period not exceeding one year in advance. It will make such reports, giving such information regarding the operations of the Exchange and the prices charged as the Licensor may from time to time request. It shall pay to the Licensor a rental and royalty at the rate per instrument of Seventy (70) per cent. of the telephone rental and royalty fixed as above (being a discount of Thirty (30) per cent.), to commence on each telephone on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licensor's office, on the tenth day of each month up to the last day of the same month. Until otherwise fixed the rates shall be as follows:

Battery transmitter, each instrument per year.....	\$10
Magneto-telephone, each instrument ".....	\$10

180 Upon each instrument unlawfully detained from the Lessor, the Exchange shall pay ten dollars per month until satisfactory proof of its destruction be furnished; shall pay five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall pay the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its

use, nor satisfy any other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

(9) The Licensor may enter the offices and connect with the exchange system any lines to extra-territorial points and to telegraph offices, in order to establish communication between customers of the Exchange and telegraph companies or parties reached by said lines, and may there operate said lines with suitable appliances; the Exchange will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch-board or other connections for direct communication, as may be requested, and in such manner, not inconsistent with the proper conduct of its office, as the Licensor shall direct. But if the Licensor is not satisfied with the manner in which it is performed it may establish its own offices and trunk and radiating lines for this purpose. The Exchange will not, without special leave of the Licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations, or news for sale or publication, nor any communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of

transmitting messages for other parties shall be authorized
181 or knowingly allowed by the Exchange to transmit such messages over such lines. The Exchange will turn over and deliver to the Licensor and such parties as it may from time to time appoint, exclusively, all messages for electrical transmission to points outside said territory collected by or coming on the wires or within the control of said Exchange, where the Licensor or such party has wires and will transmit the same, so far as the Exchange can lawfully control the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the Licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall establish, and shall exhibit its accounts and the tickets from which they are made, so far as may be proper to verify the same. The Exchange will, if and when so requested by the Licensor, make proper switch-board or other connection between the extra-territorial lines of the Licensor or its Licensees terminating in the exchange office, for the purpose thereby of making up a through line between points without said exchange district. In respect of all the business provided for by this section, the Exchange shall make no charge to its own subscriber or customer, but shall make the following charges and none others: the Lessee shall receive upon communications originating within the Exchange and passing over the lines of the Exchange and the extra-territorial lines by direct connection, fifteen per cent. of the gross tolls on the extra-territorial line not to exceed

five cents for any one message or communication occupying not more than five minutes: in case the Exchange shall be required to make a switch-board connection for the purpose of making
182 up a through line between points without said exchange district, then the Exchange shall receive as compensation for making such connection, such share of the through toll (terminal expenses being first deducted) as may be agreed upon, not however a greater share thereof than ten miles is of the whole length of the through line so made up, and not in any event to exceed five cents for any one communication occupying not more than five minutes: upon messages collected by the Exchange over its lines or otherwise and forwarded by telegraph, the Exchange shall receive twenty-five per cent. of the commission paid to the Lessor by the telegraph company, and the whole of the compensation for messenger service paid by the telegraph company: for delivering telegraph messages by telephone to subscribers, the Exchange may have free use of the Lessor's line to the telegraph office, when such use does not interfere with the proper despatch of outgoing business, and may receive from the telegraph company the whole of such compensation as it and the telegraph company may agree upon: for messages delivered by messenger for the telegraph company, it may receive the whole compensation. The Licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

(10) If the Exchange shall fail to pay any sums due hereunder for thirty days after the same shall become payable, or shall violate any other terms or conditions of this contract, and shall persist in such default, violation, or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the Licensor, or shall become bankrupt or insolvent, the Licensor may, if it shall so elect, by a written notice to the Exchange (or those in charge of its principal office), terminate all rights granted by the Licensor hereunder, and thereupon may by its agents sever the circuit on which any telephone is placed, and take possession of and remove the telephone, and for that purpose may enter the premises of
183 the Exchange and all persons claiming under it; or it may collect, from any sub-lessee or subscriber, all sums then or thereafter due to it or to the Exchange for the use of any instruments, circuits, and appliances, or under any subscription contract; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephones any subscriber or other person in actual possession, and collect from him such sums as may then and thereafter be or become due for the use of the telephone and exchange lines, appliances and services, and for that purpose shall be entitled to and may take possession, of all the lines, fixtures, apparatus, appliances and premises of the Exchange used for carrying on its business, and occupy and operate the same in connection with said telephones and those of additional customers as an exchange, or connect such lines with an office of its own for that purpose; the Licensor shall have the like right upon and within three months after the termination of the rights of the Exchange hereunder by efflux of time or other-

wise; and may enforce these provisions by an entry, without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor (and others permitted by it) in the use of said telephones, lines, switch-boards and appliances. The property so taken, and which does not belong to the Lessor or revert to it hereunder, may be returned within three months from the taking, in which case it shall pay to the Exchange a reasonable compensation for its use, or the Lessor may retain the same as its own property and shall pay therefor a reasonable price (not exceeding the actual cost) within four months after the taking, and shall account to the Exchange for all sums collected which accrued before the Licensor became so entitled to possession, deducting all expenses incident thereto, and all that may be due to it. The

184 Lessor also reserves all its rights and remedies in law and in equity, under the patent laws or otherwise, including the remedy by injunction against the Exchange or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. If several exchange systems are established hereunder, these rights and remedies of the Lessor shall, in case of any default, apply to all such systems or to one alone at its option. The Lessor may also use the name of the Exchange to protect its interests and to enforce its rights hereunder, and the Exchange shall execute assignments in accordance herewith.

(11) This contract is personal to the second party herein named, and any assignment or attempt to assign it, or the rights granted or lines established hereunder, by act of the party or operation of law, without the written consent of the Licensor, will be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by said party, or by its executors or administrators to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The party of the second part promise that they will keep and observe all the stipulations herein contained on their part to be kept and performed. Whenever the Licensor grants to others the rights for connecting lines or any other rights remaining to it, the stipulations hereof relating thereto shall be binding upon and enure to the benefit of such grantees, and the Licensor shall not be responsible for their acts or defaults. If the Licensor shall transfer to any party who shall agree to perform the stipulations hereof its title to the telephones hereby leased and the patent rights under which they are licensed, and its then existing interests hereunder, it is agreed that the provisions hereof enure to the benefit of and are binding upon
185 such party in respect of all things done or to be done after such assignment, as if it were named a party hereto, and this said American Bell Telephone Company shall no longer be responsible hereunder.

The Licensee also agrees that it will not allow any telegraph company to use or to have any rights, on poles or other structures leased or put up by, or belonging to or under the control of said Licensee,

without the written assent of the said American Bell Telephone Company.

In addition to the rights conferred by this agreement the party of the first part hereby grants to the party of the second part the right to connect with each of the Exchanges, established under this contract subscribers outside of the territory of such Exchange and within such portion of the adjacent territory as is in each case described in said Schedule "A."

The words "within" on the 30th line, "months from the date hereof" on the 31st line were erased, and the words "on or before December 1st, 1880, in each of said Cities" were interlined on the 30th line before signing.

Signed in duplicate on the day first above written.

(Sd.) By AMERICAN BELL TELEPHONE CO.,
W. H. FORBES, *Prest.*

[Seal T. A. B. T. Co.]

(Sd.) O. E. M.

In presence of

(Sd.) C. EMERSON,
As to W. H. F.

(Sd.) By EAST TENNESSEE TELEPHONE CO.,
CLARENCE CAREY, *Vice Prest.*
(Sd.) D. I. CARSON, *Sec'y.*

Witness as to sig. of Clarence Carey and D. I. Carson.

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SCHEDULE A.

The Municipality of Knoxville in the County of Knox and State of Tennessee, as an Exchange District, with the right to connect subscribers located within a radius of Five (5) miles from the Post Office in said Municipality.

The Municipality of Chattanooga in the County of Hamilton and State of Tennessee, as an Exchange District, with the right to connect subscribers located within a radius of Five (5) miles from the Post Office in said Municipality.

The Municipality of Frankfort in the County of Franklin and State of Kentucky, as an Exchange District, with the right to connect subscribers located within a radius of Five (5) miles from the Post Office in said Municipality.

The Municipality of Paducah in the County of McCracken and State of Kentucky, as an Exchange District, with the right to connect subscribers located in the State of Kentucky within a radius of Five (5) miles from the Post Office in said Municipality.

The Municipality of Lexington in the County of Fayette and State of Kentucky, as an Exchange District, with the right to connect sub-

scribers located within a radius of Five (5) miles from the Post Office in said Municipality.

This Schedule is annexed to and a part of the Contract dated November 16th, 1880, between the American Bell Telephone Company and the East Tennessee Telephone Company. (Form 109C)

AMERICAN BELL TELEPHONE CO.,

(Sd.)

By W. H. FORBES, *President*.

(Sd.)

O. E. M.

In presence of

(Sd.) C. EMERSON

As to W. H. F.

[Seal T. A. B. T. Co.]

[Seal E. T. T. Co.]

EAST TENNESSEE TELEPHONE COMPANY,

(Sd.)

By CLARENCE CAREY, *Vice-Pres'd't*.

(Sd.)

D. I. CARSON, *Sec'y*.

(Sd.) THOMAS O. BELL,

Witness as to Sig. of Clarence

Carey and D. I. Carson.

"C," R. W. Devonshire.

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Copy.

Form 109 D.

This Agreement, made this Twenty-first day of June A. D. 1881, by and between the American Bell Telephone Company, a corporation created under the laws of the State of Massachusetts, Lessor and Licensor, party of the first part, and the East Tennessee Telephone Company, a corporation created under the laws of the State of New York, Lessee and Licensee, party of the second part, Witnesseth:

(1) Whereas, the Lessor owns the Letters Patent of the United States granted to Alexander Graham Bell, March 7th, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas the Lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of telephonic district or exchange systems established and owned by it in the territory hereinafter described under the provisions hereinafter set forth: now it is agreed as follows:

(2) The rights hereby granted shall be perpetual, unless determined as hereinafter provided, and shall extend to all Exchanges established and owned by the Licensee, and wholly within the following described territory, namely: the Counties of Ballard, Callo-way, Fulton, Graves, Hickman, Marshall and McCracken in the State of Kentucky.

(3) For the purpose of this contract an "Exchange" or "a district or exchange system" means a system in which different stations on the same or different circuits, and either within any city or town, or within a radius of fifteen miles of a central office, are connected with such central office or branch offices, for the purpose of placing subscribers or other parties by such circuits in communication with such central or branch offices, or with each other either directly or through the agents of the system. No office or line of an Exchange can be connected with any point outside of its territory, nor with any telegraph company's office or line, except by lines of the Licensor or parties specially designated by it for this purpose, nor, except in connection with such lines, can the lines of an Exchange be used for performing any part of the work of transmitting messages by telephone to points outside its territory, and no telegraph company, unless specially permitted by the Licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers, nor shall any person use the same telephone in connection with different exchange systems.

(4) The Licensor, at its general office or factory, will deliver to the second party, as needed, electric speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the second party during the continuance hereof shall be deemed to be furnished hereunder, unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the second party may choose from among such standard patterns. Each of said telephones shall remain the property of the Licensor, and is hereby leased, and the use of it licensed under said patents and all others under which the Lessor has or may have a right to license, so far as applicable thereto, for the purposes
189 herein declared for the term of one year from the day when rent and royalty begin to accrue on it as provided in Article 8, but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year, by the second party and those using the telephone under it, shall ipso facto operate to renew the lease and license for another year, and so on until the expiration or other determination hereof; in no case, however, beyond the term defined by Article 2. The second party is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use them in connection with the trunk lines reserved to the Licensor by Article 9, for the purposes and to the extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the Licensor and as the provisions

hereof are not violated, but not longer or otherwise; and it may grant said right to its customers by contracts as provided in Article 7. The Lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the second party hereunder exist, except telephones to be used on the lines of Exchanges having their central offices outside said territory by persons within said territory who are or may be subscribers to or customers of such Exchanges; but the second party shall, by general or special exchange, supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specifically granted remain to the Licensor.

(5) The Lessor will license to be used with such telephone, the inventions in call-bells, switches, switch-boards, and other apparatus needed for such telephone lines, which it can so license, upon such royalties as it may from time to time establish, not greater
190 than those fixed for others under similar circumstances; but such call-bells, switches, switch-boards and other apparatus shall be used only with telephones licensed by the Lessor, and the second party agrees not to use them otherwise nor to dispose of them to any one except those so licensed, or to the licensed manufacturers of the Lessor. The second party may enjoy any rights of way and similar franchises to maintain said lines which the Lessor can permit it to use, when and so long as, in the judgment of the Lessor, it shall not interfere with the Lessor's enjoyment thereof, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. For trunk lines from the several exchange offices to points outside of the respective exchange Districts and to telegraph offices, the Lessor may, without further compensation, enjoy all rights of the Licensor to erect and maintain lines, and may use its poles and fixtures, but shall pay a pro rata share of the cost of erecting and maintaining them.

(6) The Lessee admits the validity of all patents relating to telephony and telephonic appliances now or hereafter held by the Licensor or under which it may hold licenses exclusive in their character, and the validity of its title thereto, and will not dispute the same, nor make, use or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

(7) The contract between the second party and those who are to use telephones under it, as herein provided, shall express in such form as the Lessor shall from time to time approve, that the telephone is the property of the Licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is an injury to and
191 invasion of the rights of the Licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction, and other legal redress, in a suit by it in its name and behalf. The second party shall require every person using said telephones for communications or messages sent or to be sent over other telephone or telegraph lines, to provide for payment of tolls thereon, and to make every such message subject to such stipulations, regulations, and con-

ditions respecting the liability of such lines for errors and mistakes as the Licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts, to be agreed to by the subscriber and customer, as the Licensor may from time to time approve, and will hold the Lessor harmless from all loss and expense consequent upon its failure so to do.

(8) The second party shall charge subscribers to its Exchange such rental and royalty for the telephones as the Licensor may fix from time to time, for these and other like exchanges, and also in addition a sum not exorbitant nor unusual for the use of call-bells, batteries, wires, and other appliances, and for services furnished or performed, and may collect both of said sums for a period not exceeding one year in advance. It will make such reports, giving such information regarding the operation of its Exchanges and the prices charged as the Licensor may from time to time request. It shall pay to the Licensor a rental and royalty at the rate per instrument of seventy (70) per cent. of the telephone rental and royalty fixed as above (being a discount of thirty (30) per cent.), to commence on each telephone on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licensor's office, on the tenth day of each month up to the last 192 day of the same month. Until otherwise fixed, the rates shall be as follows:

Battery transmitter, each instrument per year.....	\$10.00
Magneto-telephone, each instrument ".....	10.00

Upon each instrument unlawfully detained from the Lessor, the second party shall pay ten dollars per month until satisfactory proof of its destruction be furnished; shall pay five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall pay the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its use, nor satisfy any other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

(9) The Licensor may enter the offices and connect with the exchange systems of the second party any lines to points without the territories of such Exchanges respectively, and to telegraph offices, in order to establish communication between customers of the Exchanges and telegraph companies or parties reached by said lines, and may there operate said lines with suitable appliances; the second party will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch-board or other connections for direct communication, as may be requested, and in such manner, not inconsistent with the proper conduct of its office, as the Licensor shall direct. But if the Licensor is not satisfied with the manner in which it is performed, it may establish its

own offices and trunk and radiating lines for this purpose. The second party will not, without special leave of the Licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations, or news

for sale or publication, nor any communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the second party to transmit such messages over such lines. The second party will cause each of its Exchanges to turn over and deliver to the Licensor and such parties as it may from time to time appoint, exclusively, all messages for electrical transmission to points outside the territory of such Exchange collected by or coming on the wires or within the control of the Exchange, where the Licensor or such party has wires and will transmit the same, so far as the second party can lawfully control the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the Licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall establish, and shall exhibit its accounts and the tickets from which they are made, so far as may be proper to verify the same. Each Exchange shall, if and when so requested by the Licensor, make proper switch-board or other connection between the lines of the Licensor or its Licensees from points without its exchange district and terminating in such exchange office, for the purpose thereby of making up a through line between points without such exchange district. In respect of all the business provided for by this section, the second party shall make no charge to its own subscriber or customer, but shall make the following charges and none others: the second party shall receive upon communications originating within an Exchange and passing over the lines of the Exchange and the extra territorial lines

194 by direct connection, fifteen per cent. of the gross tolls on the extra-territorial line not to exceed five cents for any one message or communication occupying not more than five minutes: in case an Exchange shall be required to make a switch-board connection for the purpose of making up a through line between points without its exchange district, then the Exchange shall receive as compensation for making such connection, such share of the through toll (terminal expenses being first deducted) as may be agreed upon, not however a greater share thereof than ten miles is of the whole length of the through lines so made up, and not in any event to exceed five cents for any one communication occupying not more than five minutes: upon messages collected by an Exchange over its lines or otherwise and forwarded by telegraph, the Exchange shall receive

twenty-five per cent. of the commission paid to the Lessor by the telegraph company, and the whole of the compensation for messenger service paid by the telegraph company: for delivering telegraph messages by telephone to subscribers, an Exchange may have free use of the Lessor's line to the telegraph office, when such use does not interfere with the proper despatch of outgoing business, and may receive from the telegraph company the whole of such compensation as it and the telegraph company may agree upon: for messages delivered by messenger for the telegraph company, it may receive the whole compensation. The Licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

(10) If the second party shall fail to pay any sums due hereunder for thirty days after the same shall become payable, or shall violate any other terms or conditions of this contract or of a contract preliminary hereto between the same parties dated April 1st 195 A. D. 1881, and shall persist in such default, violation, or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the Licensor, or shall become bankrupt or insolvent, the Licensor may, if it shall so elect, by written notice to the second party (or those in charge of any of its offices), terminate all rights granted by the Licensor hereunder, and thereupon may by its agents sever the circuit on which any telephone is placed, and take possession of and remove the telephone, and for that purpose may enter the premises of the second party and all persons claiming under it; or it may collect, from any sub-lessee or subscriber, all sums then or thereafter due to it or to the second party for the use of any instruments, circuits, and appliances, or under any subscription contract; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephone any subscriber or other person in actual possession, and collect from him such sums as may then and thereafter be or become due for the use of the telephone and exchange lines, appliances, and services, and for that purpose shall be entitled to and may take possession of all the lines, fixtures, apparatus, appliances, and premises of the second party used for carrying on its business, and occupy and operate the same in connection with said telephones and those of additional customers as exchange systems, or connect such lines with offices of its own for that purpose; the Licensor shall have the like right upon and within three months after the termination of the rights of the second party hereunder by efflux of time or otherwise; and may enforce these provisions by an entry, without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor (and others permitted by it) in the use of said telephones, lines, switch-boards and appliances.

The property so taken and which does not belong to the Lessor or revert to it hereunder, may be returned within three months from the taking, in which case it shall pay to the second party a reasonable compensation for its use, or the Lessor

may retain the same as its own property, and shall pay therefor a reasonable price (not exceeding the actual cost) within four months after the taking, and shall account to the second party for all sums collected which accrued before the Licensor became so entitled to possession, deducting all expenses incident thereto, and all that may be due to it. The Lessor also reserves all its right and remedies in law and in equity, under the patent laws or otherwise, including the remedy by injunction against the second party or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. These rights and remedies of the Lessor shall, in case of any default, if the Lessor shall so elect, apply only to the Exchange or Exchanges in which such default has occurred. The Lessor may also use the name of the second party to protect its interests and to enforce its rights hereunder, and the second party shall execute assignments in accordance herewith.

(11) This contract is personal to the second party herein named, and any assignment or attempt to assign it, or the rights granted or lines established hereunder or any or either of them, by act of the party or operation of law, without the written consent of the Licensor, will be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by said party, to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The party of the second part promises that it will keep and observe all the stipulations herein contained on its part to be kept and performed.

197 Whenever the Licensor grants to others the rights for connecting lines or any other rights remaining to it, the stipulations hereof relating thereto shall be binding upon and enure to the benefit of such grantees, and the Licensor shall not be responsible for their acts or defaults. If the Licensor shall transfer to any party who shall agree to perform the stipulations hereof its title to the telephones hereby leased and the patent rights under which they are licensed, and its then existing interests hereunder, it is agreed that the provisions hereof enure to the benefit of and are binding upon such party in respect of all things done or to be done after such assignment, as if it were named a party hereto, and this said American Bell Telephone Company shall no longer be responsible hereunder.

The Licensor also agrees that it will not allow any telegraph company to use or to have any rights, on poles or other structures leased or put up by, or belonging to or under the control of said Licensee, without the written assent of the said American Bell Telephone Company.

Eight (8) words on line 22, the words "A. D. 18" and the word "sooner" on line 23, and five (5) words on line 218, were erased before signing, and the following words interlines; on the 179th line after the word "contract" the words "or of a contract pre-

liminary hereto between the same parties dated April 1st, A. D. 1881."

Signed in duplicate on the day first above written.

[SEAL.] THE AMERICAN BELL TELEPHONE
CO.,

By Its General Manager,
(Sd.) THEO. N. VAIL.

(Sd.) O. E. M.

Approved.
(Sd.) W. H. FORBES, *Pres.*

[SEAL.] THE EAST TENNESSEE TELEPHONE
CO.,
(Sd.) CLARENCE CARY, *Vice Pres.*

Attest:
(Sd.) D. I. CARSON, *Sec'y.*

(Sd.) L. C. TALLMADGE,
Witness as to signatures of Clarence Cary and D. I. Carson.

Ex'd.
C. E.
C. M. M.

"D." R. W. Devonshire.

198 This Agreement made this twenty-fourth day of November A. D. 1887, by and between The American Bell Telephone Company, a corporation created under the laws of the Commonwealth of Massachusetts, of the first part, the East Tennessee Telephone Company, a corporation created under the laws of the Commonwealth of Kentucky, of the second part, and the East Tennessee Telephone Company, a corporation created under the laws of the State of New York, of the third part.

Witnesseth: Whereas the first party and the third party did on the first day of April, A. D. 1881, enter into an agreement a copy whereof is hereto annexed and marked "A", a list of the exhibits attached to the said agreement being hereto annexed and marked "B", and did in pursuance thereof execute the license contracts thereby called for, and

Whereas the third party has certain license contracts for exchange purposes, for extra-territorial connecting lines, and for private line purposes, issued to it by the first party, a schedule of which is hereto annexed marked "C", and

Whereas the second party has been formed with a capital of Five Hundred Thousand Dollars divided into shares of par value of \$100 each, for the purpose of acquiring the property and business of the third party, and has acquired or bargained to acquire said

property and business including the right with the consent of the first party to have an assignment of said agreement and license contracts, the second party paying for all the property and business of the third party the sum of one hundred and thirty two thousand eight hundred and twenty-one dollars (\$132,821) in shares of its capital stock at par, that is to say, one share of the capital stock of the second party for each share of the capital stock of the 199 third party, the shares so paid being the issued capital stock of the second part, and

Whereas the second party desires to have an assignment of said agreement and license contracts, and to have the consent of the first party thereto.

Now Therefore, in consideration of the premises and of the covenants on the part of the several parties herein contained.

1. The third party hereby assigns, transfers, and sets over unto the second party all and singular said agreement and license contracts as aforesaid held by it, and all its rights in, to, and under the same, subject, however, to all acts, duties, covenants conditions and agreements therein on its part to be done, kept and performed, and all singular the rights of the first party therein contained. The second party hereby accepts said assignment, and in consideration of the consent of the first party to said assignment promises and agrees to and with the first party, said The American Bell Telephone Company, to be bound by and subject to all and singular the terms and conditions of said agreement, and license contracts as to all things hereafter done, or to be done, except as hereinafter modified, with like effect as if it the second party were named party of the second part thereto, the first party assents to said assignment, and the first party, the second party and the third party agree that the third party shall no longer be subject to or entitled to the benefits of said agreement and license contracts.

2. Whereas in said agreement dated April 1st, 1881, it is provided that the first party should be entitled to a three-tenths interest in said East Tennessee Telephone Company, and in all and singular its property and rights, and to receive three tenths of the profits of its business and for the accomplishment thereof, should in addition to the stock payment then presently to be made, be entitled to thirty per cent. of any increase in the amount of the capital stock of the third party that might be made, and

200 Whereas all the capital stock of the second party except that issued to pay for the property and business of the third party as above set forth remains unissued and is hereinafter called treasury stock.

Now therefore, said first party in substitution for its right to receive thirty (30) per cent. of any increase in the amount of the capital stock of the third party shall be entitled to, and from time to time have thirty (30) per cent of any increase hereafter made in the amount of the capital stock of the second party and thirty (30) per cent. of any and all issues of said treasury stock, all such shares to be issued to the first party to be lawfully issued, full paid and not subject to any assessment or contribution.

In Witness Whereof, on the day and year first above written the several parties hereto have caused their respective corporate seals to be hereto affixed and these presents to be signed in duplicate by their respective officers thereto duly authorized.

[SEAL.]

EAST TENNESSEE TELEPHONE CO.
OF NEW YORK,

By its President—

(S'd)

O. F. NOEL.

By its Secretary—

(S'd)

JAMES E. CALDWELL.

[SEAL.]

EAST TENNESSEE TELEPHONE CO.
OF KENTUCKY,

By its Vice-President—

(S'd)

ISAAC T. RHEA.

By its Secretary—

(S'd)

JAMES E. CALDWELL.

[SEAL.]

THE AMERICAN BELL TELEPHONE
CO.,

By its General Manager—

(S'd)

JOHN E. HUDSON.

Approved—

(S'd)

H. STOCKTON, *President.*

(S'd)

C. J. F.

"E." R. W. Devonshire.

A.

201 This agreement made this first day of April A. D. 1881, by and between the American Bell Telephone Company, a corporation created under the laws of the Commonwealth of Massachusetts, of the first part, and the East Tennessee Telephone Company, a corporation created under the laws of the State of New York, of the second part, Witnesseth:

Whereas the said party of the second part holds the following named license agreements, that is to say:

(1) Three contracts with the first party hereto in form No. 109 C, for exchange purposes viz: a contract dated November 16, 1880, a contract dated December 14, 1880, for exchanges in Maysville in the County of Mason and State of Kentucky, and a contract, dated December 14, 1880, for exchanges in the City of Bowling Green in the County of Warren and State of Kentucky.

(2) Two contracts with the first party hereto in form No. 116 B, for supply of telephones for private lines and other purposes, one dated November 16, 1880, and one dated January 4, 1881, and

Whereas said second party desires to surrender and give up said several agreements, and all its rights thereunder and to have from said first party certain other licenses as hereinafter set forth and said American Bell Telephone Company has agreed to accept said surrender and to grant such other licenses upon the terms and conditions and for the considerations hereinafter set forth.

Now Therefore it is agreed as follows:—

(1) The capital stock of said second party is sixty thousand dollars in six hundred shares of one hundred dollars each.

2. Said second party agrees that it will forthwith surrender and give up said several license contracts so as aforesaid held by it and all and singular its rights under the same respectively.

202 3. Said American Bell Telephone Company agrees that upon the surrender of said several contracts it will for the considerations and upon the terms and conditions hereinafter expressed enter into the following described agreements with said party of the second part, that is to say:

(a) The contracts (in form 109 D.) for Exchange purposes, in the forms hereto annexed marked A. B. C. D. & M.

(b) The contracts for the supply of telephones for private lines and other purposes in the forms hereto annexed marked E. F. G. H.

(c) The contract for extra-territorial connecting lines in the form hereto annexed marked I. J. K. L.

All telephones heretofore furnished to the second party under either of said contracts for exchanges, dated November 16 and December 14, 1880, shall from the date of the execution of said contracts in the forms annexed marked A. B. C. and D. be held by the second party and by all sublessees under such of said new contracts for exchanges purposes as includes the territory in which such telephones shall be in use with the same effect as if they had actually been furnished thereunder except that rentals and royalties on said telephones shall begin at the date of such new contract.

As to all telephones which have been heretofore furnished to said second party under either of said contracts for the supply of telephones for private lines and other purposes, dated November 16, 1880, and January 4, 1881, the second party shall from the date of the execution of said new contracts for the same purposes in forms annexed marked E. F. G. H. have the same rights and be subject to the same duties and liabilities that it said second party would have had and been subject to if each of said telephones had actually been

203 furnished under such of said new contracts for the same purposes as includes the territory in which such telephone is leased except that rentals and royalties on said telephone shall begin from the date of such new contracts.

Whereas it is agreed that in consideration of the grant of the right to use and rent telephones as in said agreements hereto annexed set forth and in addition to the rentals and royalties and other payments provided for, said American Bell Telephone Company shall be entitled to three tenths interest in said East Tennessee Telephone Company and in all and singular its property and rights and to receive three tenths of the profits of the business of said East Tennessee Telephone Company, now for the accomplishment of said purpose it is agreed that said East Tennessee Telephone Company shall in consideration of such grant and in addition to the rentals, royalties and other payments in said contracts provided for, and in part payment therefor forthwith upon the execution hereof pay and deliver or cause to be assigned, transferred and delivered to said American Bell Telephone Company one hundred and eighty shares

of its capital stock (being three-tenths thereof) full paid and not subject to any assessment or contribution and shall in further payment for said grant from time to time, if and when an increase in the amount of its capital stock shall be made, issue to or cause to be assigned, transferred and delivered to said American Bell Telephone Company thirty per cent. of such increase full paid and not subject to any assessment or contribution.

The first party agrees that it will release to said second party any claims as a stockholder for dividends which may be declared before June 1, A. D. 1885 of profits actually earned and received before said date. Executed in duplicate the day and year first above written.

[SEAL.] THE AMERICAN BELL TELEPHONE CO.,

By its General Manager—

(S'd) THEO. N. VAIL.

Approved—

(S'd) W. H. FORBES, *Pres't.*

THE EAST TENNESSEE TELEPHONE CO.,

(S'd) By CLARENCE CARY, *Vice-Pres't.*

Attest—

(S'd) D. I. CARSON, *Sec'y.*

[SEAL.]

(S'd) L. C. TALLMADGE,

Witness as to Signatures of Clarence Cary and D. I. Carson.

204

Nature.	Form.	Date.	Expiration.	Territory.
Exchange..	109D..	June 21, '81	Perpetual..	Counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Green, Hamblen, Hamilton, Hancock, Hawkins, James, Jefferson, Johnson, Knox, Loudon, Marion, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Union and Washington in the State of Tennessee.
"	"	"	"	Counties of Allen, Barren, Butler, Edmonson, Greene, Hart, Logan, Metcalfe, Monroe, Simpson, and Warren in the State of Kentucky.
"	"	"	"	Counties of Anderson, Bath, Bourbon, Bracken, Clarke, Fayette, Fleming, Franklin, Harrison, Jessamine, Lewis, Mason, Menifee, Montgomery, Nicholas, Robertson, Rowan, Scott and Woodford in the State of Kentucky.
"	"	"	"	Counties of Ballard, Calloway, Fulton, Graves, Hickman, Marshall, and McCracken in the State of Kentucky.
"	"	"	"	County of Montgomery in the State of Tennessee.
Priv. Lines.				* * *
Ex. Terr.				* * *

"B."

205

Copy.

Contract for Exchanges.

Form 109 D.

This Agreement, made this Twenty first day of June A. D. 1881, by and between the American Bell Telephone Company, a corporation created under the laws of the State of Massachusetts, Lessor and Licensor, party of the first part, and the East Tennessee Telephone Company, a corporation created under the laws of the State of New York, Lessee and Licensee, party of the second part, witnesseth:

(1) Whereas, the Lessor owns the Letters Patent of the United States granted to Alexander Graham Bell, March 7, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas the Lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of telephonic district or exchange systems established and owned by it in the territory hereinafter described under the provisions hereinafter set forth; now it is agreed as follows:

(2) The rights hereby granted shall be perpetual, unless determined as hereinafter provided, and shall extend to all Exchanges established and owned by the Licensee, and wholly within the following described territory, namely:—The counties of Ballard, Callo-way, Fulton, Graves, Hickman, Marshall and McCracken in the State of Kentucky.

206 (3) For the purpose of this contract an "Exchange," or "a district or exchange system" means a system in which different stations on the same or different circuits, and either within any city or town, or within a radius of fifteen miles of a central office, are connected with such central office or branch offices, for the purpose of placing subscribers or other parties by such circuits in communication with such central or branch offices, or with each other, either directly or through the agents of the system. No office or line of an Exchange can be connected with any point outside of its territory, nor with any telegraph company's office or line, except by lines of the Licensor or parties specially designated by it for this purpose, nor, except in connection with such lines, can the lines of an Exchange be used for performing any part of the work of transmitting messages by telephone to points outside its territory, and no telegraph company, unless specially permitted by the Licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers, nor shall any person use the same telephone in connection with different exchange systems.

(4) The Licensor, at its general office or factory, will deliver to the second party, as needed, electric speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the second party during the continuance hereof shall be deemed to be furnished hereunder, unless otherwise specially designated by the Licensor. They will be of such character and pattern and bear such marks as the Lessor shall from time to time determine, but the second party may choose from among such standard patterns. Each of said telephones shall remain the property of the Licensor, and is hereby leased, and the use of it licensed under said patents and all others under which the Lessor has or may

207 have a right to license, so far as applicable thereto, for the purposes herein declared for the term of one year from the day when rent and royalty begin to accrue on it as provided in Article 8, but the due payment thereof to the Licensor, and the due performance of the stipulations hereof during said year, by the second party and those using the telephones under it, shall ipso facto operate to renew the lease and license for another year, and so on until the expiration or other determination hereof; in no case, however, beyond the term defined by Article 2. The second party is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use them in connection with the trunk lines reserved to the Licensor by Article 9, for the purposes and to the extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the Licensor and as the provisions hereof are not violated, but no longer or otherwise; and it may grant said right to its customers by contracts as provided in Article 7. The Lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the second party hereunder exist, except telephones to be used on the lines of Exchanges having their central offices outside said territory by persons within said territory who are or may be subscribers to or customers of such Exchanges, but the second party shall, by general or special exchanges, supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specifically granted remain to the Licensor.

(5) The Lessor will license to be used with such telephones, the inventions in call-bells, switches, switch-boards, and other apparatus needed for such telephone lines, which it can so
208 license, upon such royalties as it may from time to time establish, not greater than those fixed for others under similar circumstances; but such call-bells, switches, switch-boards and other apparatus shall be used only with telephones licensed by the Lessor, and the second party agrees not to use them otherwise nor to dispose of them to any one except those so licensed, or to the licensed manufacturers of the Lessor. The second party may enjoy any rights of way and similar franchises to maintain said lines which

the Lessor can permit it to use, when and so long as, in the judgment of the Lessor, it shall not interfere with the Lessor's enjoyment thereof, and shall pay whatever may be due to third persons, if anything, growing out of or in connection with such use by it. For trunk lines from the several exchange offices to points outside of the respective exchange Districts and to telegraph offices, the Lessor may, without further compensation, enjoy all rights of the Licensee to erect and maintain lines, and may use its poles and fixtures, but shall pay a pro rata share of the cost of erecting and maintaining them.

(6) The Lessee admits the validity of all patents relating to telephony and telephonic appliances now or hereafter held by the Licensor or under which it may hold licenses exclusive in their character, and the validity of its title thereto, and will not dispute the same, nor make, use, or be interested in any telephones or telephonic lines or business not licensed by the Licensor or its assigns.

(7) The contract between the second party and those who are to use telephones under it, as herein provided, shall express in such form as the Lessor shall from time to time approve, that the telephone is the property of the Licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is
209 an injury to and invasion of the rights of the Licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction, and other legal redress, in a suit by it in its name and behalf. The second party shall require every person using said telephones for communication or messages sent or to be sent over other telephone or telegraph lines, to provide for payment of tolls, hereon, and to make every such message subject to such stipulations, regulations, and conditions respecting the liability of such lines for errors and mistakes as the Licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts, to be agreed to by the subscriber and customer, as the Licensor may from time to time approve, and will hold the Lessor harmless from all loss and expense consequent upon its failure so to do.

(8) The second party shall charge subscribers to its Exchanges such rental and royalty for the telephones as the Licensor may fix from time to time, for these and other like exchanges, and also in addition a sum not exorbitant nor unusual for the use of call-bells, batteries, wires, and other appliances, and for services furnished or performed, and may collect both of said sums for a period not exceeding one year in advance. It will make such reports, giving such information regarding the operations of its Exchanges and the prices charged as the Licensor may from time to time request. It shall pay to the Licensor a rental and royalty at the rate per instrument of Seventy (70) per cent. of the telephone rental and royalty fixed as above (being a discount of Thirty (30) per cent.), to commence on each telephone on the first day of the second calendar month after its shipment by the Licensor, to continue until the instrument shall be put into the possession of the Licensor, or proved to be destroyed, and to be paid in equal monthly payments in advance at the Licen-

- 210 sor's office, on the tenth day of each month up to the last day of the same month. Until otherwise fixed, the rates shall be as follows:

Battery transmitter, each instrument, per year.....	\$10.00
Magneto-telephone, each instrument ".....	\$10.00

Upon each instrument unlawfully detained from the Lessor, the second party shall pay ten dollars per month until satisfactory proof of its destruction be furnished; shall pay five dollars for each lost or destroyed otherwise than by fire or inevitable accident, and shall pay the expense of ordinary repairs; but said payments shall not confer any right to the instrument, nor to its use, nor satisfy any other breach of covenant, nor impair the right of the Licensor to obtain possession of any instrument or lines.

(9) The Licensor may enter the offices and connect with the exchange systems of the second party any lines to points without the territories of such Exchanges respectively, and to telegraph offices, in order to establish communication between customers of the Exchanges and telegraph companies or parties reached by said lines, and may there operate said lines with suitable appliances; the second party will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch-board or other connections for direct communication, as may be requested, and in such manner not inconsistent with the proper conduct of its office, as the Licensor shall direct. But if the Licensor is not satisfied with the manner in which it is performed, it may establish its own offices and trunk and radiating lines for this purpose. The second party will not, without special leave of the Licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations, or news for sale or publication, nor any communications in behalf of other parties

211 than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the second party to transmit such messages over such lines. The second party will cause each of its Exchanges to turn over and deliver to the Licensor and such parties as it may from time to time appoint, exclusively, all messages for electrical transmission to points outside the territory of such Exchange collected by or coming on the wires or within the control of the Exchange, where the Licensor or such party has wires and will transmit the same, so far as the second party can lawfully control the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the Licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall es-

tablish, and shall exhibit its accounts and the tickets from which they are made, so far as may be proper to verify the same. Each Exchange shall, if and when so requested by the Licensor, make proper switch-board or other connection between the lines of the Licensor or of its Licensees from points without its exchange district and terminating in such exchange office, for the purpose thereby of making up a through line between points without such exchange district. In respect of all the business provided for by this section, the second party shall make no charge to its own subscriber or customer, but shall make the following charges and none others: the second party shall receive upon communications originating within an Exchange and passing over the lines of the Exchange and the extra-territorial lines by direct connection, fifteen per cent. of the gross tolls on the extra-territorial line not to exceed five cents

212 for any one message or communication occupying not more than five minutes: in case an Exchange shall be required to make a switch-board connection for the purpose of making up a through line between points without its exchange district, then the Exchange shall receive as compensation for making such connection, such share of the through toll (terminal expenses being first deducted) as may be agreed upon, not however a greater share thereof than ten miles is of the whole length of the through line so made up, and not in any event to exceed five cents for any one communication occupying not more than five minutes: upon messages collected by an Exchange over its lines or otherwise and forwarded by telegraph, the Exchange shall receive twenty-five per cent. of the commission paid to the Lessor by the telegraph company, and the whole of the compensation for messenger service paid by the telegraph company; for delivering telegraph messages by telephone to subscribers, an Exchange may have free use of the Lessor's line to the telegraph office, when such use does not interfere with the proper despatch of outgoing business, and may receive from the telegraph company the whole of such compensation as it and the telegraph company may agree upon: for messages delivered by messenger for the telegraph company, it may receive the whole compensation. The Licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

(10) If the second party shall fail to pay any sums due hereunder for thirty days, after the same shall become payable, or shall violate any other terms or conditions of this contract, or of a contract preliminary hereto between the same parties dated April 1st, A. D. 1881, and shall persist in such default, violation, or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the Licensor, or shall become bankrupt or insolvent,

the Licensor may, if it shall so elect, by written notice to the
213 second party (or those in charge of any of its offices), terminate all rights granted by the Licensor hereunder, and thereupon may by its agents sever the circuit on which any telephone is placed, and take possession of and remove the telephone, and for that purpose may enter the premises of the second party and all persons claiming under it; or it may collect, from any sub-lessee or sub-

scriber, all sums then or thereafter due to it or to the second party for the use of any instruments, circuits, and appliances, or under any subscription contract; or it may, so long as it shall see fit, leave in the enjoyment and use of the telephones any subscriber or other person in actual possession, and collect from him such sums as may then and thereafter be or become due for the use of the telephone and exchange lines, appliances, and services, and for that purpose shall be entitled to and may take possession of all the lines, fixtures, apparatus, appliances and premises of the second party used for carrying on its business, and occupy and operate the same in connection with said telephones and those of additional customers as exchange systems, or connect such lines with offices of its own for that purpose; the Licensor shall have the like right upon and within three months after the termination of the rights of the second party hereunder by efflux of time or otherwise; and may enforce these provisions by an entry, without being deemed guilty of any trespass, or by legal process, including an injunction to prevent any interference with the Licensor (and others permitted by it) in the use of said telephones, lines, switch-boards, and appliances. The property so taken, and which does not belong to the Lessor or revert to it thereunder, may be returned within three months from the taking in which case it shall pay to the second party a reasonable compensation for its use.

214 or the Lessor may retain the same as its own property and shall pay therefor a reasonable price (not exceeding the actual cost) within four months after the taking, and shall account to the second party for all sums collected which accrued before the Licensor became so entitled to possession, deducting all expense incident thereto, and all that may be due to it. The Lessor also reserves all its right and remedies in law and in equity, under the patent laws or otherwise, including the remedy by injunction against the second party or those claiming under it, for the use of any of its patented inventions or instruments not justified by a subsisting license hereunder, or for the violation of any other of its rights. These rights and remedies of the Lessor shall in case of any default, if the Lessor shall so elect, apply only to the Exchange or Exchanges in which such default has occurred. The Lessor may also use the name of the second party to protect its interests and to enforce its rights hereunder, and the second party shall execute assignments in accordance herewith.

(11) This contract is personal to the second party herein named, and any assignment or attempt to assign it, or the rights granted or lines established hereunder or any or either of them, by act of the party or operation of law, without the written consent of the Licensor, will be a violation hereof, and good ground for a cancellation hereof by the Licensor; but consent shall be given to an assignment by said party, to any party who in the opinion of the Licensor is fitted and suitable to carry on the business, and who shall in writing become bound by the terms hereof. The party of the second part promises that it will keep and observe all the stipulations herein contained on its part to be kept and performed. Whenever the Licensor grants to others the rights for connecting lines or any other rights remaining

to it, the stipulations hereof relating thereto shall be binding upon
and enure to the benefit of such grantees, and the Licensor
215 shall not be responsible for their acts or defaults. If the

Licensor shall transfer to any party who shall agree to perform
the stipulations hereof its title to the telephones hereby leased and
the patent rights under which they are licensed, and its then existing
interests hereunder, it is agreed that the provisions hereof enure to
the benefit of and are binding upon such party in respect of all
things done, or to be done after such assignment, as if it were named
a party hereto, and this said American Bell Telephone Company
shall no longer be responsible hereunder.

The Licensee also agrees that it will not allow any telegraph com-
pany to use or to have any rights, on poles or other structures leased
or put up by, or belonging to or under the control of said Licensee,
without the written assent of the said American Bell Telephone
Company.

Eight (8) words on line 22, the words "A. D. 18" and the word
"sooner" on line 23, and five (5) words on line 218, were erased
before signing and the following words interlined; on the 179th
line after the word "contract" the words "or of a contract prelimi-
nary hereto between the same parties dated April 1st, A. D. 1881."

Signed in duplicate on the day first above written.

[SEAL.]

THE AMERICAN BELL TELEPHON-
CO.,

By its General Manager,

(Sd.)

THEO. N. VAIL.

(Sd.)

O. E. M.

Approved.

(Sd.)

W. H. FORBES, *Prest.*

[SEAL.]

THE EAST TENNESSEE TELEPHONE
CO.,

(Sd.)

By CLARENCE CARY, *Vice Prest.*

Attest:

(Sd.)

D. I. CARSON, *Sec'y.*

(Sd.)

L. C. TALLMADGE,

Witness as to Signature of

Clarence Cary and D. I. Carson,

Filed October 10, 1908.

J. R. PURYEAR, *Clerk.*

216 In the United States Circuit Court for the Western District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
versus
CITY OF PADUCAH, Defendant.

Petition for Appeal.

To the Hon. Walter Evans, Circuit Court Judge of the United States for the Western District of Kentucky:

The above named petitioner, City of Paducah, Kentucky, conceiving it is aggrieved by the final decree entered in the above entitled cause on the 8th day of July, 1909, hereby appeals from said decree in so far as same adjudges and decrees that the right of the East Tennessee Telephone Company to maintain and operate a telephone exchange in the City of Paducah, and to erect poles and string wires thereon, is upheld and sustained, and in so far as the said City of Paducah, its officers, agents and employees, and all other persons are enjoined and restrained from interfering with, or obstructing the complainant in operating a telephone exchange in said City until the said City shall enact and put in force an ordinance in the exact form and of the exact substance agreed upon between the complainant and the defendant and set forth in the Bill of Complaint, and until said ordinance and the franchise therein referred to has been fairly and in good faith offered at public sale, and has been sold in the way therein provided for, and in so far as said decree and judgment directs that the option is given to the said City of Paducah of permitting the present status to remain perpetually or to enact the said agreed ordinance and put same in force, and in so far as the Court assumed and retained jurisdiction of this action. And the said City of Paducah prays that this, its appeal to the Supreme Court of the United States, may be allowed, and that a transcript of the record and proceedings and papers upon
217 which said final decree and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and Your Petitioner further prays that the proper orders touching the security to be required of it to perfect this appeal, be made.

HAL S. CORBETT AND
JAMES CAMPBELL, JR.,
Att'ys for Defendant.

Appeal allowed upon conditions stated in order of this date. December 13, 1910.

WALTER EVANS, *Judge.*

Filed December 13, 1910.

218 In the United States Circuit Court for the Western District
of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

VS.

CITY OF PADUCAH, Defendant.

Assignment of Errors.

Now, on the 22nd day of November, 1910, *came* the defendant, City of Paducah, by its attorneys, James Campbell, Jr., and Hal S. Corbett, and say- that the decree entered in the above cause on the 8th day of July, 1909, is erroneous and unjust to the defendant.

1. In overruling and denying the defendant's demurrer to complainant's bill.

2. In overruling and denying defendant's motion to dissolve the temporary restraining order granted herein.

3. In overruling and denying the defendant's plea to the jurisdiction of this court.

4. In not making, rendering and entering a decree in favor of the defendant dissolving the temporary restraining order.

5. In holding and deciding that the complainant had a contract with the defendant, City of Paducah, to maintain and operate a telephone exchange in said City of Paducah, and to erect poles and string wires thereon, in connection with said exchange.

6. In holding that the City of Paducah had a legal or enforceable contract of compromise with the complainant.

7. In holding and deciding that the City of Paducah be enjoined and restrained from interfering with or disturbing complainant in operating a telephone exchange in said City, and in connection therewith, erecting poles and stringing wires thereon until

219 the defendant, City of Paducah, shall enact and put in force an ordinance in the exact form and exact substance agreed upon between the parties, as set forth in the Bill of Complaint.

8. In holding and decreeing that said City be enjoined and restrained from interfering with, or disturbing complainant in operating a telephone exchange in said City, and in connection therewith, to erect poles and string wires thereon until the defendant, City of Paducah, shall duly enact and put in force an ordinance of the exact form and exact substance agreed upon between complainant and defendant, and until under said ordinance the franchise therein referred to has been fairly and in good faith carried out by said sale, and fairly and in good faith, been sold in the way therein provided for.

9. In holding and deciding that said City of Paducah shall have the option to permit the present status to remain perpetually, or else enact the agreed upon ordinance, and fairly put same into force.

10. In not holding that the contract made between one branch of the legislative power of the City of Paducah and the complainant herein was void.

11. In not holding that on November 15th, 1880, the said City of Paducah had no right to grant a telephone franchise to any one.

12. In not holding that the complainant herein required no right, under the pretended grant of the American Bell Telephone Company, from the City of Paducah.

13. In not holding that the complainant herein was a trespasser of the streets and public ways of the City of Paducah.

14. In not holding that the City of Paducah had permitted no act, and had done nothing which would estop it from denying the right of the complainant to operate a telephone system in the City of Paducah.

15. In not, upon the final hearing of the whole cause, dismissing complainant's bill.

16. In adjudging that the complainant recover of the City of Paducah its costs herein expended.

17. In holding and adjudging that this Court had jurisdiction to try this case.

18. In holding and adjudging that this Court had jurisdiction over the subject matter and the parties to this action.

19. In admitting incompetent evidence of Robert W. Devonshire, in so far as said Robert W. Devonshire testified that the records of the office of the American Bell Telephone Company contained a contract between the National Bell Telephone Company and James M. Arms and Henry H. Tallmadge, and in testifying that the National Bell Telephone Company is the predecessor of the American Bell Telephone Company, and in filing a copy of a contract between James M. Arms and Henry H. Tallmadge and the American Bell Telephone Company, as Exhibit "A" to his deposition, and in testifying that the records of the office of the American Bell Telephone Company contained a contract between the National Bell Telephone Company, the American Bell Telephone Company, James M. Arms, Henry H. Tallmadge and the East Tennessee Telephone Company of date November 16th, 1880, and permitting said witness to file a copy of said contract as a part of his deposition marked Exhibit "B," and in permitting said witness to file a copy of a contract known as Contract for Exchanges, form 109 C, dated 16th of November, 1880, between the American Bell Telephone Company and the East Tennessee Telephone Company of New York, marked Exhibit "C," and in filing a copy of a certain other contract known as Contract for Exchanges, form 109 D, dated June 21st, 1881, between the American Bell Telephone Company and the East Tennessee Telephone Company of New York, marked Exhibit "D" of said witness' deposition, and in permitting witness to file a copy of a certain other contract between the American Bell Telephone Company and the East Tennessee Telephone Company of Kentucky, dated November 24th, 1887, and marked Exhibit "E."

HAL S. CORBETT AND
JAMES CAMPBELL, JR.,
Att'ys for Def't.

Filed December 13, 1910.

222 United States Circuit Court, Western District of Kentucky,
at Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
vs.
CITY OF PADUCAH, KENTUCKY, Defendant.

Order.

This day came the City of Paducah, Kentucky, by Hal S. Corbett and James Campbell, Jr., its counsel, and filed a petition for an appeal to the Supreme Court of the United States from the proceedings and judgment herein, and also its assignment of errors thereon, and it is ordered that the said appeal be and it is granted and allowed, but upon the condition that the said City of Paducah, Kentucky, shall first give a bond with good surety thereon conditioned according to law and in the penal sum of \$250 if it is not desired that the judgment shall be superseded, but in the sum of \$25,000 if it is desired and intended that the appeal shall operate as a supersedeas of the judgment herein. In either case the bond is to be approved by the Court before it becomes effective.

WALTER EVANS, *Judge.*

December 13th, 1910.

223 In the Circuit Court of the United States for the Western
District of Kentucky.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,
vs.
CITY OF PADUCAH, Defendant.

Appeal Bond.

Know all men by these presents, that we, City of Paducah, Kentucky, as Principal, and the Fidelity & Deposit Company of Maryland, having an office and principal place of business in the City of Baltimore, State of Maryland, are held and firmly bound unto the above named complainant, East Tennessee Telephone Company, in the sum of two hundred and fifty dollars (\$250.00) to be paid to the said complainant as its interest may appear, which payment, well and truly to be made, we bind ourselves jointly and severally and our and each of our successors and assigns, jointly by these presents.

Sealed with our seals and dated this the 21st day of December, 1910.

Whereas, the above named defendant, City of Paducah, hath prosecuted its appeal to the Supreme Court of the United States to reverse the final judgment and decree rendered in the above entitled suit by the Circuit Court of the United States for the Western District of Kentucky; now, therefore, the condition of this obligation is,

that if the above named City of Paducah shall prosecute its said appeal to effect and answer all costs that may be adjudged or awarded against it if it shall fail to make good its plea then this obligation to be void; otherwise, to remain in full force and effect.

CITY OF PADUCAH,

By JAMES P. SMITH, *Mayor*.

THE FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

By W. A. BERRY, *Attorney in Fact*.

Attest:

[SEAL.]

W. P. HUMMEL, *Ag't*.

Approved 12/21/10.

JAMES CAMPBELL, JR.,
City Solicitor.

Filed Dec. 24, 1910.

224 United States Circuit Court, Western District of Kentucky, at
Paducah.

EAST TENNESSEE TELEPHONE COMPANY, Complainant,

vs.

CITY OF PADUCAH, Defendant.

Order.

This day came the defendant, the City of Paducah, Kentucky, and tendered an appeal bond with the Fidelity and Deposit Company of Maryland as its surety thereon, which bond is now accepted and approved by the Court, and is ordered to be filed and given effect according to its terms.

WALTER EVANS, *Judge*.

December 24th, 1910.

Endorsed on cover: File No. 22,571. W. Kentucky C. C. U. S. Term No. 950. City of Paducah, Kentucky, appellant, vs. East Tennessee Telephone Company. Filed March 8th, 1911. File No. 22,571.



200

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 246.

CITY OF PADUCAH, KY., APPELLANT,

vs.

EAST TENNESSEE TELEPHONE COMPANY.

United States Circuit Court, Western District of Kentucky, at
Paducah.

EAST TENNESSEE TELEPHONE CO.

vs.

CITY OF PADUCAH.

Opinion.

This case presents very curious and unusual features, but without particularizing them it will suffice, for our present purposes, to note, first, that after all that has occurred in the last twenty-five or more years it would be vain to say that the defendant has not yielded its full consent to the carrying on by the complainant of its telephone business over and along the streets of the city; second, that the complainant is authorized, by the terms of its charter, to carry on such a business—that is to say, the carrying on of such business is not beyond its corporate powers; third, that by a writing duly executed and filed in the office of the Secretary of State the complainant accepted the provisions of the Constitution of Kentucky; fourth, that by the express terms of the contract or compromise agreement approved in August, 1904, all matters of dispute between the parties were thereby “settled and ended”; fifth, that the complainant paid to the city the three thousand dollars agreed to be paid under the stipulations of that agreement, and though since this suit was brought and the temporary injunction granted the city tendered back the money, the complainant under such circumstances was not bound to receive it because it might thereby weaken or destroy its claim that all matters of dispute had been “settled and ended”; sixth, that unless the city was bound by every consideration of justice and good faith to pass the ordinance agreed upon as part of the compromise referred to, then such considerations have lost their legitimate

force and application as applied to the conduct of men and municipalities; seventh, that the city as represented by the members of its council declined after so receiving the three thousand dollars to meet the stress of those considerations, and refused to enact the ordinance, though the bill does not, even if it could have properly done so, pray for the specific execution of that agreement; eighth, that the ordinance directing the Board of Public Works to refuse permission to the complainant to erect poles and string wires on the streets was repealed shortly after the injunction herein was issued, and, ninth, that the city, through its solicitor, avowed at the hearing that the city and its Board of Public Works had not since that time undertaken to refuse such permission.

Instead of the form of ordinance agreed upon in the compromise a radically different ordinance was passed. That ordinance proposed to sell the franchise but fixed the maximum rates of charges at least 32 per cent. lower than those provided for in the ordinance agreed upon in the proposed compromise. Nothing was done and nothing could be done under the ordinance actually passed, and, thus the situation remains up to this time.

The complainant insists that the court has jurisdiction of the case, although both parties are citizens of Kentucky, because of the averments and showing of the bill that there was a contract in force between the parties, the obligation of which was sought to be impaired by the action of the legislative department of the city. It seems to me that this claim was well founded when the bill was filed. The subsequent repeal of the ordinance directing the Board of Public Works to refuse permission to the complainant to erect poles and string wires in the street could not of itself defeat a jurisdiction which had been previously acquired, however much such repeal might effect the measure of relief to be granted by the final hearing.

Looking at the prayer for general relief, but without going into details, I think the justice, equity and right of this case demand that the defendant shall be enjoined from interfering with the present status as to the erecting of poles and stringing wires until it has duly enacted and put into force an ordinance in the form and of the substance agreed upon between the parties, and to which we have referred, and also until under such ordinance the franchise therein referred to has been fairly and in good faith offered at public sale and has fairly and in good faith been sold in the way therein provided for. It is by no means clear that the temporary injunction should be made perpetual in the technical sense, but I think the city should have the option either to pass the ordinance agreed to by the compromise or else to permit the present status to continue permanently. It seems to me that this is the equity of this case.

A judgment accordingly may be prepared and submitted, in which also the costs of the action should be adjudged against the defendant. In view of the option given the judgment should provide that control of the case should be retained so as to meet any emergency and provide for the hearing and determination of any question that may be raised after the option has been exercised by the city.

July 8th, 1909.

WALTER EVANS, *Judge*.

UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, A. G. Ronald, Clerk of the District Court of the United States, for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the Opinion filed in said court, on the 8th day of July A. D. 1909, in the cause wherein East Tennessee Telephone Co., is the complainant and City of Paducah the Defendant, as the same appears from the original now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 2nd day of May A. D. 1913.

[SEAL.]

A. G. RONALD, *Clerk,*

By ———, *D. C.*

[Endorsed:] 246/22,571.

[Endorsed:] File No. 22,571. Supreme Court U. S. October term, 1912. Term No. 246. City of Paducah, Kentucky, Appellant, vs. East Tennessee Telephone Company. Certified copy of opinion of Circuit Court of the United States for the Western District of Kentucky. Filed May 5, 1913.

ADJUTANT GENERAL'S OFFICE

WASHINGTON, D. C.

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No. 246

MAR 13 1913

JAMES H. MCKERN

United States Supreme Court.

CITY OF PADUCAH
Appellant

VS.

EAST TENNESSEE TELEPHONE COMPANY
Appellee

BRIEF OF COUNSEL FOR APPELLANT.

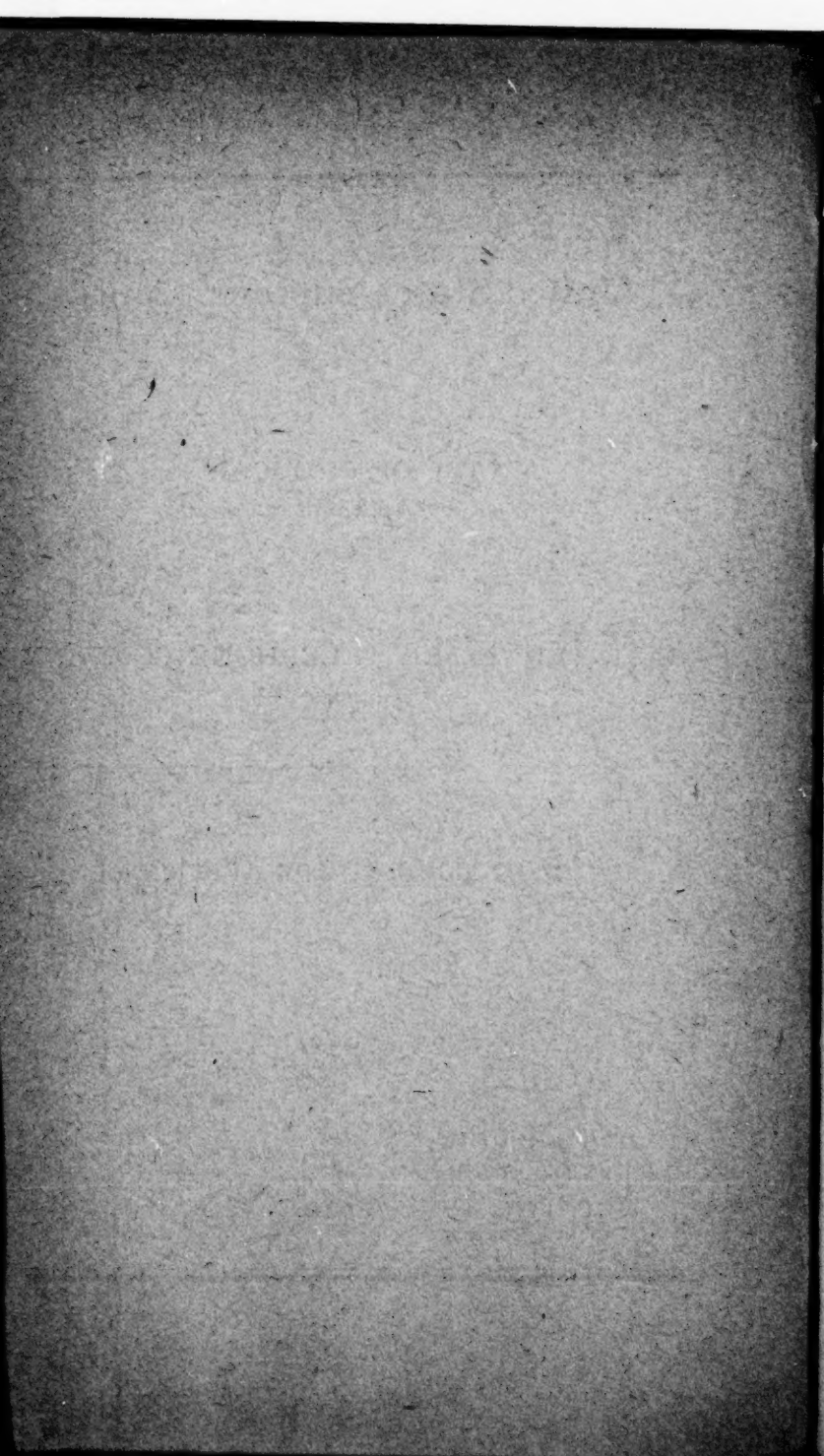
W. F. Bradshaw, Jr.

A. Y. MARTIN,

City Solicitor.

H. S. CORBETT,
JAMES CAMPBELL, Jr.

Special Counsel.



United States Supreme Court.

CITY OF PADUCAH

Appellant

VS.

EAST TENNESSEE TELEPHONE COMPANY

Appellee

BRIEF OF COUNSEL FOR APPELLANT.

STATEMENT OF CASE AND ISSUES.

This action was filed by the appellee East Tennessee Telephone Company in the Circuit Court for the Western Division of Kentucky, on December 28, 1905, five days after the approval by the Mayor of Paducah of a certain resolution passed by the General Council of said city, in words and figures as follows:

“Be it resolved by the Common Council of the City of Paducah that the East Tennessee Telephone Company is now doing business in the City of Paducah without license and without authority of law, and be it further resolved that the Board of Public Works be, and is hereby, directed to issue to said East Tennessee Telephone Company no permits to use the streets of Paducah, Kentucky, for any purpose until said company shall first obtain a franchise to do business in said City of Paducah.”

This resolution was approved by the Mayor December 23, 1905, and appears on page 10 of the record as a part of complainant's bill.

The complainant, East Tennessee Telephone Company, further discloses in its bill, which appears on pages 2 to 13 inclusive of the record, that it is a successor to another company by the same name organized under the laws of New York on May 26, 1880; that upon the organization of the New York company it acquired from the American Bell Telephone Company the privilege to conduct a telephone business and use certain telephone apparatus in the City of Paducah; that said rights to conduct a telephone business and said apparatus were owned and controlled by the American Bell Telephone Company under patent rights, and such acquisition of said rights and apparatus was necessary.

Complainant further alleges that on November 1, 1880, (over five months after it made said purchase from the American Bell Telephone Company) said New York company **caused** the following communication to be addressed to the Mayor and City Council of Paducah:

“To His Honor Mayor and City Council of the City of Paducah, Kentucky:

We, the subscribers, humbly petition your Honorable Body for **permission** to erect poles and hang wires thereon throughout your city, for the purpose of establishing a telephone exchange for the convenience of your citizens.

Trusting that your Honorable Body will grant our petition, we are,

Respectfully,

BELL TELEPHONE COMPANY,

W. G. Washburn, Agent.”

(See page 3 of Record.)

That on November 15, 1880, the following action was taken by the Common Council:

“To the Honorable Mayor and City Council of Paducah:

Gentlemen:—We, your committee, to whom was referred the petition of W. G. Washburn, agent of Bell Telephone Company, in the matter of erecting telephone poles throughout the city, would respectfully recommend that said prayer be granted, on the following conditions, viz:

The poles not to be less than thirty-five feet in height, ten inches in diameter at the base, and good proportion all way up to top, to be painted red at base and white from red to the top of the pole.

E. J. HOLLAND,
W. E. AUGUSTUS,
Committee.”

“On motion, the report was received, recommended and concurred in.”

(See page 4 of the Record.)

It is upon these two actions of the Legislative Boards of the City of Paducah this litigation arises. For complainant further alleges that pursuant to the authority granted on November 15, 1880, above quoted, its predecessor, the New York Company proceeded to erect a telephone exchange, poles, wires and other equipments. That said predecessor entered into a contract with the city, by the terms of which the city was granted the use of certain telephone poles to string fire alarm wires. (See page 4 of the record.) That in June, 1887, the complainant was organized and on November 16, 1887, it purchased from the New York Company all the property, rights, franchises and privileges connected with the Paducah exchange, and has continuously since

said time operated same; that said exchange has been extended and enlarged and a large amount of money has been expended by complainant thereby; that the city has recognized the right of complainant to conduct its business in Paducah by not having molested it, and by accepting the free use of a certain number of local telephones.

Complainant further discloses that in December, 1903, the city adopted an ordinance placing a pole rental license upon telephone and telegraph companies doing business in the city; that a suit was instituted by the city against complainant in May, 1904, to collect the license provided for by said ordinance, but that said suit was compromised, and the complainant paid three thousand dollars in cash and agreed to purchase a franchise. (See page 6 of record.) Complainant further disclosed that the franchise created by ordinance of the city was not in accordance with the terms of the agreement made with certain members of the General Council of the city by which said suit was compromised and said three thousand dollars was paid, and that complainant therefore refused to become a bidder therefor or to purchase same.

It is further shown that in October, 1905, an action was instituted in the State Court by the city to compel the East Tennessee Telephone Company to vacate the streets of the city, and, pending said suit, a notice was served upon the said Telephone Company by the Board of Public Works of the city (a purely ministerial body) not to erect any more poles on the streets. That said Telephone Company paid no attention to this notice, and thereafter the General Council of the city adopted the resolution of December 23, 1905, above quoted.

The basis of the complaint is that by the action of

the Common Council on November 15, 1880, granting permission to erect telephone poles, etc., on the streets of the city, and the acts of the city subsequently in recognition of that right, the Telephone Company acquired a fixed, vested right both by contract and by recognition of that right, and that the resolution of the General Council of December 23, 1905, was a law adopted in violation of such rights, and in violation of the Fourteenth Amendment of the Constitution of the United States, and also of section 10 of article 2 of the constitution, and therefore asks for both a temporary restraining order and a permanent injunction.

The city in its answer makes a general traverse of most of the allegations of complainant's bill, and more particularly said city denies that the East Tennessee Telephone Company of either New York or Kentucky caused the communication of November 1, 1880, to be addressed to the Common Council, or that the permission granted to the Bell Telephone Company by the Common Council on November 15, 1880, was a grant to the East Tennessee Telephone Company, or to anyone else than the one therein named, to-wit: the Bell Telephone Company. Particularly also is it denied that the City of Paducah, at the time of the alleged grant of November 15, 1880, had any right or authority delegated to it by the Legislature of Kentucky to grant any franchise to a telephone or telegraph company to use the streets of the city for the erection of poles or in any other special way. It is also denied that the East Tennessee Telephone Company of either New York or Kentucky ever became the purchaser of or otherwise acquired from the American Bell Telephone Company the right to operate a telephone business in said city or to use the patented apparatus of said American Bell

Telephone Company in said city. It was further denied that the resolution of December 23, 1905, abridged any of the contract rights of the telephone company or took its property without due process of law. The jurisdiction of the Circuit Court was questioned both upon demurrer and by answer of defendant, the Court holding that it had jurisdiction and that the relief prayed for should be granted complainant East Tennessee Telephone Co. The judgment appears on page 55 of the record.

Errors Relied Upon for Reversal.

The appellant City of Paducah feels itself aggrieved by certain errors of the Circuit Court as set out in the assignment of errors appearing on page 126 of the record, but more especially does the appellant complain, because:

1. The Court erred in overruling and denying the appellant's general demurrer to complainant's bill;
2. The Circuit Court retained jurisdiction of the case;
3. The Court overruled appellant's motion to dissolve the temporary restraining order granted in this action;
4. The Court upon the trial of the whole case refused to dissolve the temporary restraining order, but rendered a judgment perpetuating said injunction;
5. The Court held that the appellee had a legal and enforceable contract with appellant to maintain and operate a telephone exchange in the City of Paducah, and to erect poles upon the streets of said city and string telephone wires thereon in connection with said telephone exchange, and holding that said contract had been violated;

6. The Court held that the appellee had a legal and enforceable contract with the appellant to compromise a disputed claim against appellee, by the payment of money and the adoption by the Legislative Board of appellant of an ordinance creating a telephone franchise containing certain clauses or terms;
7. The Court enjoined the appellant from interfering with or disturbing appellee in the operation or maintenance of its telephone business or from setting poles in the streets of the city or stringing wires thereon until the city passed an ordinance in the exact form and substance as agreed upon by appellee and certain members of the General Council of the city in effecting a compromise of the suit in the State Court, and offering for sale the franchise created by said ordinance;
8. The Court failed to hold that the appellant had not been delegated authority by the Kentucky Legislature in November, 1880, to grant a franchise to telephone companies to use the streets of the city to erect poles thereon and string wires thereover;
9. The Court failed to hold that the permission granted on November 15, 1880, was not to the American Bell Telephone Co.;
10. The Court admitted the incompetent evidence of Robert W. Devonshire, a witness called in behalf of appellee, in that, over the objections of appellant, said witness was permitted to state that the records of the office of the American Bell Telephone Company at Boston, Mass., contained a contract executed by the National Bell Telephone Company and James M. Ormes and Henry H. Talmadge, and further permitted said witness, over the objection of appellant, to file a copy of said contract as part of his deposition, without proving that said copy had

been made by the witness from the original or that said witness knew same to be a true or correct copy by having compared same with the original, or otherwise, or that said witness was the custodian of said original contract. The witness, Robt. W. Devonshire, over the objections of appellant, was further permitted to testify concerning the existence of a certain contract between the National Bell Telephone Co., the American Bell Telephone Co., James M. Ormes, Henry H. Talmadge and the East Tennessee Telephone Co., also of the existence of a contract between the American Bell Telephone Co. and the East Tennessee Telephone Company of New York, dated Nov. 16, 1880, and known as contract for exchanges form 109-C, also of the existence of a certain contract between the American Bell Telephone Company and the East Tennessee Telephone Company of New York, dated June 21, 1881, and known as contract for exchange form 109-D, also of the existence of a contract between the American Bell Telephone Company and the East Tennessee Telephone Company of Kentucky, dated November 24, 1887, and, further, over the objections of appellant, permitted said witness to file copies of said contracts as part of his deposition without proving that said witness was the custodian of said contracts, or that said copies had been made by said witness from the originals or that he knew same to be true or correct copies of the originals by comparison therewith or otherwise, and all of this in the face of the witness' own testimony that some one, other than himself, had charge of and was the custodian of said original contracts.

Jurisdiction of the Circuit Court.

The first question that presents itself is that of the jurisdiction of the Circuit Court. The jurisdiction of the Circuit Court is relied upon by reason of an alleged act of the City of Paducah contrary to the Fourteenth Amendment to the Constitution of the United States, and by the terms of which the complainant alleges that a law impairing the obligation of a contract has been enacted. This law, which it is alleged impairs the obligation of a contract relied upon, is in words and figures as follows:

“Be it resolved by the Common Council of the City of Paducah that the East Tennessee Telephone Company is now doing business in the City of Paducah without license, and without authority of law, and

Be it further resolved, That the Board of Public Works be, and is hereby, directed to issue to said East Tennessee Telephone Company no permits to use the streets of Paducah, Kentucky, for any business, until said company shall first obtain a franchise to do business in said City of Paducah.”

It is the very earnest and sincere contention of the appellant that the act of the City of Paducah complained of, which was a resolution of the General Council of the appellant city, the legislative board having charge and control of the business affairs of said city, is not, and cannot be construed as an act impairing any obligation of any contract that might exist between the East Tennessee Telephone Company and the City of Paducah. This conclusion is reached from an analysis of this resolution in which three potent things are disclosed:

First. That the Common Council of the City of Paducah **declares** that the East Tennessee Telephone

Company is doing business in the City of Paducah without authority of law.

Second. The Common Council directs the Board of Public Works, one of the servants of the city, not to issue permits to the East Tennessee Telephone Company to use the streets of the city, because, in the opinion of the Common Council, the East Tennessee Telephone Company has no authority in law to use such streets, and

Third. That said refusal to issue permits to the East Tennessee Telephone Company shall be continued until the East Tennessee Telephone Company obtains a right in law to use the streets of the City of Paducah.

Neither of these reasons or points involved in the resolution in any way impair any obligation the city has heretofore assumed; nor do they in any way deprive the telephone company of any of its property rights; nor is there any instruction, or attempt to instruct any person to destroy or impair any property, or the rights of the East Tennessee Telephone Company; for at most this resolution only provided that the refusal to recognize the telephone company as a lawful occupant of the city should continue only until the telephone company acquires by law the right of such occupancy. Instead of being an act for the impairment of a contract, it appears that this resolution is merely a declaration of the relationship existing between the two parties to this action, and nothing else.

Unless the resolution itself amounts to a breach of contract to such a degree that the contract, which is alleged to have existed, is impaired, then the city has been guilty of no act which would bring this controversy within the jurisdiction of the Circuit Court, for it is upon this point alone that the East Tennessee Tele-

phone Company relies in so far as the jurisdiction is concerned.

In the case of the St. Paul Gas Light Company vs. City of St. Paul, 181 U. S. 142, it appears that the St. Paul Gas Light Co. had been granted the right by the City of St. Paul to install gas light posts and gas mains for private consumers throughout the city under the restriction that the gas company should place street gas light posts at such points as it was directed by the Board of Aldermen of said city, and said contract further provided that: "In consideration whereof the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per centum per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same." After the gas light company had installed these lamp posts and had been in existence and operating under this contract for a number of years, since 1856, the City of St. Paul in January, 1897, passed the following resolution:

"Resolved, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the Board of Public Works.

Resolved, further, that the Board of Public Works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and from and after the passage of this resolution no interest be paid by the City of St. Paul to the St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

The St. Paul Gas Light Company brought an action against the City of St. Paul in which the question of jurisdiction was raised by the St. Paul Gas Light Co., alleging that the passage of said resolution was an act impairing the obligation of the contract with the city, and was hence void because it was repugnant to the constitution of the United States. This Court in passing upon this question uses the following language:

“Referring to the ordinance in question, from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to: 1, A command by the city to the Gas company to ‘forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, which said lamps have been discontinued by order of the Board of Public Works’; and, 2, A declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If, then, there by any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the

order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment, and it will become at once manifest from a consideration of the remaining provisions of the ordinance that the same results must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation to the constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determin-

able ultimately in this Court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

We believe that the principle of law governing the St. Paul case, just quoted from, fits this issue of jurisdiction, upon a careful inspection of the resolution of the General Council of the appellant, most appropriately.

In the case of City of Dawson vs. Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, 197 U. S. 178, it appears that the City of Dawson had a certain contract with the Dawson Waterworks Company, by the terms of which the city agreed to pay the waterworks company certain water rentals, but that pending this contract the city called an election to take a vote of the citizens on the question of issuing bonds for the purpose of erecting or buying waterworks and electric lights, and that this vote resulted in a vote in favor of the issual of the bonds. The Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Co., as mortgagees of the waterworks company, filed its bill in equity, setting up the contract and the alleged breach of it on the part of the city by reason of the repudiation of said contract by the city and a refusal to continue to pay the water rent under said contract, and alleged that such action on the part of the city was an act impairing the obligation of a contract, and deprived the waterworks company of its property without due process of law, contrary to the federal constitution. This Court, in passing upon the question of jurisdiction, used this language:

"The attempt, by an after thought, to give jurisdiction by setting up constitutional rights, must fail also. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to

pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the Supreme Court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed, and other acts were subsequent, subordinate to, and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts, or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Company vs. St. Paul*, 181 U. S. 142."

The case of *City of Des Moines vs. Des Moines City Railway Co.*, 214 U. S. 179, was one in which the jurisdiction of the Circuit Court to grant relief because of the passage of a certain resolution by the city council, alleged to be a law impairing the obligation of a contract, and repugnant to the constitution, was immediately brought into question, and we believe is decisive of the question of jurisdiction presented in this action. In that case the Court uses the following language:

"The plaintiff, the appellee, sets up, under a certain ordinance, a right, unlimited as to time, to construct, maintain, and operate an electric street railway in and over the streets, alleys and bridges of Des Moines. The resolution alleges to impair these rights is as follows:

"That, whereas, questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines, upon and along and over the streets and bridges and public places of the City of Des Moines; and

Whereas, It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

Be it resolved by the City Council of the City of Des Moines: That said companies be, and they are hereby, ordered to remove all of their tracks, poles, and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

Be it further resolved, That should the said railway companies fail to commence such removal within the time above specified, the city solicitor be, and he is hereby, instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

Be it further resolved, That the city clerk be, and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company, forthwith.'

We are of the opinion that this is not a law impairing the rights alleged by the appellee, and therefore the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution, as distinct from ordinance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the Courts if the appellee shall not accept the city's views. The resolution begins with a recital, that questions as to the railway companies' rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from the city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him, that he should take a possee

and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in a position of disobedience, as grounds for a suit, if the city was right."

If there is any material difference between the resolution recited in the Des Moines case and the one involved in this controversy, it is a difference which strengthens rather than weakens the contention that the Circuit Court had no jurisdiction of this case, for here we have merely a resolution declaring the legal status of the two parties, and, in the language of Mr. Justice Holmes, "simply a denial of the appellee's claim"; and further, a direction to the Board of Public Works not to recognize appellee's claim; but differing from the Des Moines case, this direction not to recognize the appellee's claim, is limited to such time as the appellee should continue to operate without authority of law; whereas, in the Des Moines case, the direction to the city solicitor not to recognize the appellee's claim was indefinite, and he was further directed to resort to the courts. So appellant's position is that certainly the resolution contained in this litigation is no stronger in its effect upon the rights of the appellee telephone company than the resolution contained in the Des Moines case was upon the rights of the Des Moines City Railway Company.

The Demurrer to the Bill.

Passing, however, this question of jurisdiction, appellant believes the next serious question for consideration is the failure of appellee's bill to allege necessary and material facts sufficient to sustain its contention that a contract was made between the City of Paducah and the East Tennessee Telephone Company.

In the first instance, this bill alleges that on the 26th day of May, 1880, there was organized under the laws of New York a corporation known as the East Tennessee Telephone Company, with power to conduct the business usually incident to a telephone company in various cities and states, including the City of Paducah; that at **that** time (May 26, 1880), the American Bell Telephone Company owned certain **patent** rights which were necessary to the East Tennessee Telephone Company, and that **thereupon** (that is, upon the organization of the East Tennessee Telephone Company in New York on May 26, 1880), the right to use these patent rights in Kentucky and Tennessee was procured from the American Bell Telephone Company by the East Tennessee Telephone Company, and in the exercise of its rights under said patent, the East Tennessee Telephone Company proceeded to build telephone lines, exchanges, etc., and to generally equip itself to do a telephone business in Paducah and other places. As far as it goes, these allegations seem to be all right, but it will be noted that there is a conspicuous absence of any allegation on the part of complainant that the American Bell Telephone Company, at the time of the alleged purchase, or at any other time, ever had the right, by charter or otherwise, to conduct a telephone business in Paducah, or any other place; the only allegation being, that the American Bell Telephone Company owned certain patent rights which had to be purchased before a telephone company could do business. It therefore cannot be presumed that the American Bell Telephone Company could then, or could have ever since that time, lawfully conducted a telephone business in Paducah.

It will also be noted that the sale from the American Bell Telephone Company to the East Tennessee Telephone Company took place on May 26, 1880, if

proper construction is put upon the language used by the pleader, and was for such rights as the American Bell Telephone Company then had in the patents or any improvements thereof, for the full life of the patents. There was no sale of future acquired franchises or privilege grants, or any obligations whatsoever to that effect, even if such an obligation would have been enforceable; and nowhere in the bill is there an allegation of any other sale or transaction by the American Bell Telephone Company to the East Tennessee Telephone Company; but the presumption is bound to be that the American Bell Telephone Company only parted with what rights it had at the time of such sale, to-wit: May 26th, 1880.

Notwithstanding, though, the transactions between the East Tennessee Telephone Company and the American Bell Telephone Company had been closed, the complainant alleges that the East Tennessee Telephone Company **caused** to be addressed to the Mayor and City Council of the City of Paducah, on November 1st, 1880, nearly six months after the alleged sale, a communication requesting permission "to erect poles and hang wires thereon throughout your city, for the purpose of establishing a telephone exchange for the convenience of your citizens", and this petition was signed "Bell Telephone Company, W. G. Washburn, agent".

On November 15th, 1880, the City Council of Paducah concurred in the recommendation of the committee, to which had been referred the petition of the Bell Telephone Company. The recommendation so concurred in by the City Council is important in its terms and runs as follows:

"We, your committee, to whom was referred the petition of W. G. Washburn, agent of the **Bell Telephone Company**, in the matter of erect-

ing telephone poles throughout the city, would respectfully recommend that said prayer be granted on the following conditions, viz: The poles to be not less than thirty-five feet in height and ten inches in diameter at the base, and good proportions all the way to the top, to be painted red at the base and white from red to the top of the pole."

By the specific terms of this grant, at the outset, it will be plainly seen the City of Paducah recognized W. G. Washburn as agent of the **Bell Telephone Company**, and complainant fails to allege in its bill that the city ever knew or had even any intimation that the East Tennessee Telephone Company was connected in any way with Washburn or the Bell Telephone Company, or had any knowledge whatever that the East Tennessee Telephone Company "**caused**" the petition of Washburn to be addressed to the City Council on November 1st, 1880.

The omission of such allegation, we believe, is fatal to the bill, for every right and act of the complainant is based upon the alleged grant of November 15, 1880, and we propose to show that a grant of this kind must be exercised by the grantee only, or by an assignee, or a transferee known and assented to by the grantor.

Even, though, for argument sake, if it were true that the Bell Telephone Company, acting through Washburn as agent, did make this request for the East Tennessee Telephone Company, we still contend that the bill is fatally defective, for there is no allegation of the East Tennessee Telephone Company ever acquiring *by* sale, contract, or in any other way, anything from the Bell Telephone Company, the only allegation along this line being that the East Tennessee Telephone Company acquired certain patent rights from the American Bell

Telephone Company six months prior to this grant. It may be contended that the American Bell Telephone Company and the Bell Telephone Company were one and the same, but such is not the allegation of the bill, and, as a matter of fact, the testimony adduced in this action shows that the Bell Telephone Company was a separate and distinct corporation from the American Bell Telephone Company.

The complainant further alleges, that, "in pursuance of said authority obtained for the East Tennessee Telephone Company, through its agent and representative W. G. Washburn, the East Tennessee Telephone Company proceeded at once to erect a telephone exchange", etc. This allegation of the agency of W. G. Washburn of the East Tennessee Telephone Company can only be taken for what it is worth, and unless coupled with the further allegation that such an agency was known to the City of Paducah to exist at the time, then it stands for naught, and is a substantial acknowledgement of fraud practiced by the East Tennessee Telephone Company, W. G. Washburn, or the Bell Telephone Company upon the City of Paducah; for, under the allegations of the bill and the petition to the city, Washburn certainly represented himself to be the agent of the Bell Telephone Company in making the request for permit to erect poles and string wires in Paducah. It will also be noticed that there is a total failure in the bill that the Bell Telephone Company was acting as the agent of the East Tennessee Telephone Company, and, certainly, this grant was made by its terms to the Bell Telephone Company.

Another serious, and we think fatal defect to complainant's bill and right to prosecute this action, is the further allegation of a purchase by the East Tennessee Telephone Company of Kentucky from the East Ten-

nessee Telephone Company of New York of the franchise alleged to have been granted by the city to the latter company. This Kentucky corporation is alleged to have been organized in June, 1887, and the sale of all the rights, properties, franchises and privileges to it by the New York corporation is alleged to have taken place on November 16, 1887. The bare sale is alleged without any allegation of any knowledge, notice, or assent of the City of Paducah thereto. There is nowhere in the bill any allegation that the City of Paducah ever at any time, either at the time of the sale, or subsequent thereto, knew of such sale or consented thereto. It will be readily noted that the chief act of the City of Paducah, on which the complainant relies, was the recognition of its franchise rights in Paducah by the contract dated April 1st, 1887, a full month before the Kentucky corporation, this complainant, came into existence, and six and one-half months before the alleged sale by the New York corporation to the Kentucky corporation.

In the last paragraph of complainant's bill this cause of action and right to maintain this suit is summed up in this statement: "Your orator further charges that the action of the officials of the City of Paducah for the past twenty-five years in recognizing your orator as having a valid and legal contract to construct and maintain a telephone exchange in the City of Paducah, and inducing your orator to expend large sums of money from time to time in the enlargement and extension of said telephone system, and knowing that your orator was relying thereon, estops said city from now denying the rights of your orator, and the action of the legislative council in undertaking to deprive your orator of said rights, which it has in said city, deprives it of its property without due process of law, and denies the

protection of law, in violation of the constitution of the United States."

Thus, the whole right of complainant is based solely on the tacit ^{recognition} ~~recommendation~~, as alleged, by the City of Paducah, of the grant of November 15, 1880, and the exercise by complainant of the privileges therein granted. We believe we can show how and why such a statement of facts in a complaint of this nature is not sufficient to base a good cause of action upon.

The East Tennessee Telephone Company, it is alleged, was organized under the laws of the State of New York on May 26, 1880, with power granted to it to "build telephone and telegraph lines and exchanges from the City of New York, by some convenient route through or across the intervening states to the City of Knoxville in the State of Tennessee", and further enumerates the cities and states in which it was empowered to build its lines and exchanges; that subsequently, in June, 1887, a corporation by the same name, to-wit: East Tennessee Telephone Company, was organized under the laws of Kentucky, with power granted it in its charter, as alleged in the bill, of "erecting, maintaining and operating telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems". In other words, the powers of complainant and its predecessor, the New York corporation, are specifically enumerated and set out in the bill. These powers pertain solely to the **building, erecting and maintenance** of telephone and telegraph lines, exchanges and such **business** as is usually done by similar corporations, and they are not, under the allegations of the bill, empowered to trade in franchises, or to sell property acquired as a quasi public corporation, and for the performance of which the law imposes upon

complainant and its predecessor a well recognized contractual liability. An enumeration of the powers of complainant or its predecessor is in law, a complete statement of all the powers possessed by complainant, and any presumption of further powers cannot be indulged in by the Court. This point was involved in the case of *Thomas vs. Railroad Company*, 101 U. S. pages 71-81, where the learned justice, in answer to the proposition that a corporation may do any act which is not either expressly or impliedly prohibited by its charter, uses this language:

“We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the **enumeration of those powers implies the exclusion of all others**”.

Again, in the case of *Oregon Railway Company vs. Oregonian Railway Company*, 130 U. S. pages 1-20, this Court uses this language:

“It may be considered as the established doctrine of this Court, in regard to the powers of corporations, that they are such only as are conferred upon them by the acts of the legislatures of the several states under which they are organized, a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter”.

The doctrine of this Court, recited in the two cases above, has ever since remained and has been referred to and approved in numerous other cases, down to the latest decision upon this point, without change, so far as we can ascertain from an examination. Kentucky has not been remiss in her recognition of this doctrine of limitation of corporate powers, for such a doctrine is announced in the cases of *East Tennessee Telephone Company vs. City of Russellville*, 51 S. W. page 308, 106 Ky. page 667; *East Tennessee Telephone Co. vs. Anderson County Telephone Co.*, 74 S. W. page 218; *Nicholasville Water Company vs. Board of Councilmen*, 36 S. W. 549; *Merchants Police and District Telephone Co. vs. Citizens Telephone Co.*, 93 S. W. page 642; *Rough River Telephone Co. vs. Cumberland Telephone and Telegraph Co.*, 84 S. W. 517; *Rural Home Telephone Co. vs. Kentucky and Indiana Telephone & Telegraph Co.*, 107 S. W. 787; *Bland vs. Cumberland Telephone and Telegraph Co.*, 109 S. W. 1180; and other cases.

If it is true, and our examination of the authorities has convinced us that it is, that the doctrine of the Thomas case is settled, then, is it not the duty of the pleader to allege in its bill the charter right to sell and purchase franchise privileges in the city of Paducah. There certainly can be no question as to the applicability of this doctrine to the American Bell Telephone Company under the allegations of the bill; nor is there even an attempt made by complainant to rely upon any franchise rights or privileges owned or granted to the American Bell Telephone Company, for complainant alleges only that its predecessor bought from the American Bell Telephone Company certain patent rights, and rights to use certain telephone apparatus. No purchase from the American Bell Telephone Company of any franchise rights is alleged, and we take it complainant

does not rely upon any sale from the American Bell Telephone Company of any franchise rights.

Under the specific terms of the grant by the City of Paducah on November 15, 1880, copied in complainant's bill, together with the application therefor, it is conclusively shown that the Bell Telephone Company was the recognized grantee. Complainant must stand or fall upon this admitted fact, for if complainant relies upon the allegation of agency of Washburn, as being the agent of the East Tennessee Telephone Company, then an acknowledged fraud has been perpetrated upon the City of Paducah, and the established rule in equity that "he who seeks equity must do equity and come with clean hands" has been grossly violated. If Washburn was the agent of the East Tennessee Telephone Company at that time, he was not acting as such in procuring this grant from the City of Paducah; nor did the City of Paducah have any knowledge or information of such agency. He made the application for the Bell Telephone Company, not for W. G. Washburn or the East Tennessee Telephone Company, and the permission was granted to the Bell Telephone Company, not to W. G. Washburn or to the East Tennessee Telephone Company. This is the necessary conclusion arrived at from the allegations of the bill. If our conclusion is true, then the rights under such a grant could only be exercised by the grantee. If the grantee was not a corporation with charter right to perform the rights granted, then certainly such franchise rights could no more be lawfully exercised by such grantee than a corporation owning and operating a water supply company could exercise them. So far as the Court knew from the allegations of the bill, the exercise of such a right by the Bell Telephone Company would be equally as far from the purposes of its existence as it would be from a water supply company.

The exercise of franchise privileges is a special privilege granted to a corporation or person to do something others could not do, and becomes a source of great revenue. The law, and uniformly the Courts, all recognize that in consideration of such unusual privileges, the beneficiary undertakes solemnly the obligation imposed upon him to perform such rights under certain restrictions sometimes specifically imposed, sometimes assumed, as a necessary result of the privileges granted. At any rate, they must be exercised by the grantee, and complete lethargy on the part of the grantee vitiates the contract. No one can deny that a contract of any kind must be assented to by two or more parties capable of giving such assent. If one is totally incapable, then the contract is an absolute nullity. The Bell Telephone Company, so far as the bill discloses, was, at the time of this grant, devoid of the power granted in its charter to exercise the privilege, and could not, in the exercise of its legal rights, have obligated itself to perform the duties imposed by the grant. If this is true, then we submit, the contract or grant was absolutely void. For it will be remembered, that at the time this grant was made, to-wit: November 15, 1880, the East Tennessee Telephone Company had acquired, on May 26, 1880, the right to use certain patent rights and telephone apparatus within the City of Paducah from the American Bell Telephone Company, the sole owner of such patent rights and apparatus, and if the East Tennessee Telephone Company owned such patent rights and privileges exclusively in Paducah on November 15, 1880, then the Bell Telephone Company had no right acquiring the privileges to use these patent rights, and exercise the privileges granted by the City Council on November 15, 1880.

We are perfectly serious in our contention that this grant was void from its incipency, but in order to present the demurrer in its entirety to the bill we will assume that the grant to the Bell Telephone Company was good. We again call the Court's attention to the fact that the complainant and the complainant's predecessor, the New York corporation, are both practically in the same attitude the Bell Telephone Company was in, under the allegations of the bill, for neither of them have the power to sell or purchase the franchise rights alleged to have been sold and purchased. The absolute failure to allege the consent of the city, the grantor to the sale of the grant of November 15, 1880, and the subsequent sale by the New York corporation in November, 1887, to the complainant is an act which has been condemned by the Courts and declared void. On the very face of this unlawful act, there appears several important reasons for its condemnation. In the first place, as we have already argued, such a privilege is an unusual one, granted for the good of the community, as well as the grantee, and it is presumed in law that the grantor exercised a certain discretion and deliberation in awarding the grant. If the interest of the public was not involved, no power could be exercised by the public. This being true, then the granting power must be actuated by motives personal to the grantor in awarding the grant. The grantor reposed in the grantee a confidence, which was personal, that the obligations assumed would be fulfilled; the grantor relied upon the financial responsibility of grantee, as one of the mediums through which the performance of the assumed obligations could be enforced. These are things strictly personal to the grantee, for one man may be equally as capable of performing an act as another, but not have the finances or financial backing to enable him to carry

out his undertaking, or may not be as honest in the opinion of his fellow man, and not deserving of the same amount of confidence. The public welfare must always be protected, and such is the universal attitude of the Courts. This alleged grant of the city on November 15, 1880, was merely a license, and we assume that it will be conceded that the doctrine has been so well established that a license privilege is personal to the licensee and may not be transferred or assigned without the consent of the granting power that this proposition needs no further argument, and it has further been held in Kentucky that even though money may have been expended by a licensee in carrying out the needs for which permission was granted, yet in the case of a municipal corporation that license may be revoked. This point was recently passed upon by the Kentucky Court of Appeals in the case of the East Tennessee Telephone Company vs. Board of Councilmen of the City of Frankfort, 141 Ky. 588. In that case the Court had up for consideration the effect of an application made by the East Tennessee Telephone Company to the City of Frankfort, on April 11, 1881, by one C. E. Taylor for permission to erect telephone poles and string wires thereover on the streets of the City of Frankfort for the purpose of establishing a telephone business. The action of the City Council on this petition appears as follows: "The petition of Mr. C. E. Taylor, for permission to the ——— Telephone Company to erect telephone poles on different streets of the city and to carry it across the city bridge was presented and granted."

It will be noted the almost exact similarity between the action of the City Council of the City of Frankfort and the action of the City of Paducah on November 15, 1880. The Court, in fixing the rights of the telephone

company under the resolution just quoted, uses this language:

"It is insisted for the telephone company that the rights given by the resolution, after being accepted and acted upon, cannot be impaired by any subsequent action of the council, and that the franchise or privilege, being without limitation as to time, is perpetual. But it will be observed that the resolution of April 11, 1881, does not purport to grant a franchise. It only grants permission to the telephone company to use the streets. A permission is no more than a license, and as a rule a license may be withdrawn by the party who grants it. Taking the resolution of April 11, 1881, as a whole, we are satisfied it was not intended as a grant of a franchise, but only as a grant of a license. He who takes under a license, although he may spend money upon it makes the investment with the knowledge that the license may be withdrawn by the grantor. The resolution of a municipal council will not be extended beyond the fair meaning of the words used, and so made to include things to the detriment of the public not fairly within the language used."

In this same case on a petition for rehearing, the Kentucky Court of Appeals in 143 Ky. page 86 uses the following language:

"The rule that a license may not be revoked after the grantee has made expenditures upon the faith of it is not maintained in many jurisdictions; and we are not willing to apply it, at least in the case of municipal bodies, for the reason that they represent the people, and all who deal with them must take notice of the limitations upon their authority. The streets of the city are laid out for the convenience of the public. The city holds the title to them for the use of the public. The city authori-

ties may regulate them for the public use; but they should have the power from time to time as the public requires, to do all things necessary for the public good. The City Council, which gives a mere permission to another to use the streets of the city in a certain way, should not be held by this to part, permanently, with the control of the subject."

This case is followed by Cumberland Telephone & Telegraph Co. vs. City of Calhoun, opinion rendered Dec. 17, 1912, 151 S. W. 659.

This case and the Frankfort case are identical in every respect. For in both cases **permission** only was requested to erect poles and hang wires thereon throughout the city, and there was no further grant of any right whatsoever except a mere permission, and, in so far as the attitude of the Kentucky Courts is concerned, the Frankfort case absolutely and undeniably fixes this permission as a revocable license, and not as a grant of any franchise privilege. The further point, however, which we are endeavoring to make that this permission or right which was granted by the City Council of Paducah to the Bell Telephone Company was not assignable, except by the consent of the city, extends to a franchise granted to a quasi public corporation and is discussed in the case of Thomas vs. Railroad Company, 101 U. S. pages 71-81, in which this Court uses this language:

"When a corporation like a railroad company has granted to it, by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which it undertakes, without the consent of the State,

to transfer to others the rights and powers conferred by charter, and to relieve the grantee of the burden which it imposes, is a violation of the contract with the State, and is void against public policy."

And again, in the case of the Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24, on this point this Court used the following language:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the Courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholder not to be subjected to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of duties to the public imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property empowers the grantee, while it continues to exist as a corporation, to sell or lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of asso-

ciation under the general laws."

"A contract of a corporation, which is ultra vires in the proper sense—that is to say, outside the object of its creation, as defined by law of its organization, and therefore, beyond the powers conferred upon it by the legislature—is not voidable only **but wholly void and of no legal effect.** The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either. No performance on either side can give the unlawful contract any validity, or be the foundation upon it."

Equally also do these same rules and principles apply to franchise privileges derived from a grantor to whom the right to grant same has been delegated by the State. If such a delegation of power has not been made by the legislature, then as a matter of course, an attempted exercise of such a power by a grantor not delegated such right, is entirely void, and this brings us down to the discussion of the authority which the City of Paducah had in November, 1880, to grant special privileges to persons or corporations in the use of its streets.

The authority of a city to grant to any person or corporation a special or unusual privilege, as alleged to have been done on November 15, 1880, must be derived entirely from the legislature, and is not an inherent power left undisturbed by the constitution. This legislative control has been well recognized by the Courts, and every effort to exercise such a right without the authority of the legislature has been denied. The law of Kentucky is well established, and has been put in such clear and unmistakable terms in the case of the East Tennessee Telephone and Telegraph Company vs.

City of Russellville, 51 S. W. page 308, 106 Ky. 667, that we again take the privilege of quoting from that case:

“Previous to the adoption of the present constitution, the council of a municipal corporation, without legislative authority, could not grant to any person or corporation the right to use the streets and alleys of a city or town for any purpose other than for which they were dedicated. The streets and alleys of a city or town are intended for public travel, and, when additional servitude is placed upon them, it is in derogation of common rights. *Ruttles vs. City of Covington*, 10 S. W. 644: *Commonwealth vs. City of Frankfort*, 17 S. W. 287.

“Section 163 of the constitution, to which we will hereafter refer, recognizes that to occupy the streets and alleys of a city or town with telephone poles and wires, is an additional servitude, by refusing telephone companies the right to enter upon the streets and alleys of a city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained. It is the imposition of a new and additional servitude on streets and alleys of a city or town to erect telephone poles and string wires thereon.”

“As to the action of the Board of Councilmen previous to the adoption of the present constitution it was invalid, and no rights accrued to Clark or the telephone company thereunder. They had no rights to be recognized by the provision of the constitution. It was not the purpose of the constitution to render valid a resolution of a Board of Councilmen, which, under the law at the time of its adoption, was invalid.”

This Russellville case has been referred to with approval by the Kentucky Court of Appeals in the cases of *East Tennessee Telephone Co. vs. Anderson County*

Telephone Co., 74 S. W. 218; Bevis vs. Vanceburg, 89 S. W. 126; Nicholasville Water Co. vs. Board of Councilmen, 36 S. W. 549; Merchants Police and District Telephone Co. vs. Citizens Telephone Co., 93 S. W. 642; Rough River Telephone Co. vs. Cumberland Telephone and Telegraph Co., 84 S. W. 517; Rural Home Telephone Co. vs. Kentucky & Indiana Telephone Co., 107 S. W. 787; Bland vs. Cumberland Telephone & Telegraph Co., 109 S. W. 1180, and, unquestionably, this is the settled law of the State of Kentucky.

This Court, in the case of Detroit Citizens' Street Ry. Co. vs. Detroit Railway, etc., 171 U. S. page 48, in passing upon the implied grant of franchise privileges to use the public property of a municipality, says:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should

be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

This doctrine has been repeatedly adhered to by this Court in numerous cases, and in one case in particular, that of *Shaw vs. City of Covington* (Ky.), 194 U. S. 593, it appears that one Charles H. Shaw, trustee of the Union Light, Heat & Power Company, and the Suburban Electric Company, a Kentucky corporation operating in the City of Covington, claimed that his company had been granted an exclusive franchise to do business in Covington in April, 1862, and that, notwithstanding its consolidation with another company in April, 1894, it still retained the right to exclusively exercise such privileges, and no law could be passed to impair the contract entered into by and through its charter grants. This Court discussed the accepted doctrine of Kentucky, in view of the opinions of the Court of Appeals and constitutional opinions, and said:

"Finally, we add to the language of the constitution the section of the statutes which the Circuit Court adjudged to have repealed the grant of a monopoly to the original company. By section 573 the provisions of all charters which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges, or immunities of any such corporations which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and the exercise of the repealed powers is made a crime. After September 28, 1897, the provisions of this chapter are to apply to all corporations if they would be applicable to such corporations if organized under this chapter. There was

nice discussion, and it is a fair question whether this section did not repeal the exclusive privilege granted to the Covington company in 1897, if that privilege survived the consolidation. But we refer to it only as an aid in construing section 556. It is another evidence of the wish and intent of the legislature to bring all corporations to a level when it could."

This opinion, we believe, in its effect goes to the extent of recognizing the right of the legislature to revoke a franchise formerly granted, but it certainly operated to the extent of a recognition of control by the legislature over the granting of franchise privileges, and it further recognizes with favor the settled policy of the State of Kentucky, as announced in the constitution of 1891, that perpetual grants and exclusive grants theretofore made, are looked upon with exceeding disfavor, and to such a degree that the constitution itself and the bill of rights both provide an inhibition against the granting of exclusive privileges to any persons, and limits the time in which special privileges may be exercised, and prescribed the manner and form which they could be granted.

We take it to be the province of this Court to, as far as practicable, recognize the settled policy of a state, especially where it is announced in such unmistakable terms as in Kentucky, on the question under discussion. We take it that not only the law as it prevailed in 1880, at the time of the alleged grant to the Bell Telephone Company by the City of Paducah, will be considered, but it will be the privilege of this Court to consider that law in the light of the present public policy of the state, and if that public policy frowns upon unlimited or perpetual special privileges, such as claimed in the bill of complaint, we take it the Court

will give great weight to the attitude of the Court of Appeals of Kentucky in construing the relationship between the City of Paducah and the appellee East Tennessee Telephone Company. This is but fair, and is a necessity, for in the exercise of special privileges by quasi public corporations, often times we encounter just such situations as we have in the case at bar. In the case at bar, as is disclosed by the bill of complainant, at the time of the alleged grant to the Bell Telephone Company or Washburn by the city, in 1880, the telephone business was practically an unknown factor in the commercial world; it was a new born infant that was only known and understood, and the possible developments only comprehended by those few men who were seeking to establish the exchanges in the various different cities and towns in the State of Kentucky. Perhaps no one connected with the City of Paducah at that time dreamed that the grant so being made to the Bell Telephone Company or Washburn was but a link in the chain which afterwards developed into an enormous factor in the commercial interest in the City of Paducah. The development of the telephone business, beginning as it did in 1879, has been probably the most rapid development of any line of business in this country, for it has grown from a hazy idea of an inventor into a means of communication from the smallest hamlet and every city of the union to any point almost in the union; therefore we say that under conditions such as these we believe it was the province of the Court to hold the complainants strictly to account for its rights alleged to exist by reason of the grant made in 1880 by the City of Paducah. We think it will be conceded that wherever the interest of the public and the interest of a private individual or corporation clash it

is the duty of the Court to resolve that doubt in favor of the public. It is the duty of the Court to protect the public from the imposition of private individuals. This policy is based upon the soundest of reasons, for, in the first place, the public is represented by a few individuals who were not chosen for their efficiency in the particular things under discussion, but are chosen as general representatives of the people in all matters, and cannot be expected to have the same amount of knowledge or the same amount of interest in the granting of such special privileges as the individual or corporation seeking such grant.

The bill of complainant fails entirely and absolutely to allege any authority granted by the legislature of the state to the City of Paducah to place additional burden upon its streets by granting permission to the Bell Telephone Company, or W. G. Washburn, in 1880, to use the streets for the erection of poles and stringing of wires thereon, and it is our most earnest contention, that the bill should state, and it should become an essential matter of proof to show that such an authority existed in the city to enter into this contract, before complaint could be made of a breach of that contract, for, if the city had no such right and exceeded her authority in making this grant to Washburn or to the Bell Telephone Company, even if the complainant did acquire legally all the rights that Washburn or the Bell Telephone Company had thereunder, then such a failure, either of the allegation in the bill or of proof, if that question was put in issue is fatal to the contention of the complainant. It may be contended that the general authority of the city to regulate and control its streets was sufficient authority to merit it in granting the permission to use the streets to erect telephone poles, as set out in the resolution of November, 1880, but this

Court, in the case of the Home Telephone and Telegraph Company vs. City of Los Angeles, 211 U. S. 265, had before it the question of granting an injunction to the telephone company against the City of Los Angeles, enjoining the city from enforcing an ordinance regulating telephone rates. In passing upon this question this Court said:

"This ordinance, enacted by the City Council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arose here. Did the City Council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. **The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required.** This proposition is

sustained by all the decisions of this Court, which will be referred to hereafter, and we need not delay further upon this point.

It has been settled by this Court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating rates. *Detroit vs. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Vicksburg vs. Vicksburg Water Works Co.*, 206 U. S. 496. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Because of the failure of complainant to make allegations in its bill, which we conceive to be necessary in order to state a cause of action, for the reasons indicated and argued, we maintain that the appellant's demurrer to this bill should properly have been sustained by the Circuit Court, and that the Circuit Court erred to the great prejudice of the appellant's rights in failing to sustain its demurrer.

The City's Lack of Authority to Grant a Franchise to a Telephone Company in 1880.

By the stipulation of facts as agreed upon and filed in this action, and appearing on pages 49, 50 and 51 of the record, it is agreed between appellant and appellee that in November, 1880, when the grant was made upon which appellee bases its franchise right in the City of Paducah, the said city was operating under a charter

grant by the General Assembly of the Commonwealth of Kentucky in 1871, and that said charter act is contained in the acts of the General Assembly of Kentucky for 1871. Upon a careful and close examination of said act, it will be ascertained the legislature had never delegated to the city the right to grant franchises or special privileges to telephone companies, and, as a matter of fact, as is shown by the testimony of Mr. James E. Caldwell, appearing on page 60 of the record, the first telephone exchanges were not erected until 1878 or 1879, so it could not have been within the contemplation of the legislature, at the time of the passage of the act of 1871, to delegate the power to the city to grant franchise rights to telephone companies, and the delegation of such power was not made until 1884 when the legislature adopted a new charter for the City of Paducah, and provided, by section 54 of said act, "the council may grant the right-of-way over the streets and other public grounds of the city to telegraph and telephone companies." The word "telephone" appearing in the charter of the City of Paducah for the first time by said act of 1884. This is another evidence, so convincing in its nature that it is almost unanswerable, that the act of the City Council of Paducah on November 15, 1880, could properly be construed only as a mere license privilege and not in any way a grant of a fixed right, for the very simple reason that the city had no legislative authority delegated to it at that time to grant any such fixed right to a telephone company. And we believe that from the cases we have quoted from heretofore we have established the fact that the settled law of Kentucky, as well as almost all other states of the union, and recognized by this Court, is to the effect that the city cannot exercise the power of granting special privileges to occupy the streets of the

city unless that power has been delegated to the city by the legislature.

The Compromise Agreement of August 30th, 1904.

On page 75 of the record there appears a copy of a resolution of the general council of the City of Paducah adopted August 30th, 1904, by the terms of which the said appellee was to pay to the city three thousand dollars, and appellant was to adopt an ordinance creating a franchise and the said appellee agreed, so it is recited in said resolution, to purchase the franchise created by said ordinance. The terms of the franchise to be adopted were not set out in said resolution, and nowhere does it appear that the general council of the City of Paducah had ever at any time agreed upon the terms of said franchise. But it is shown by the statement in appellee's bill of complaint, on page 9 of the record, that the said city, in June, 1905, did adopt an ordinance providing for the sale of a franchise, fixing the maximum rate authorized to be charged for telephone service in the city at not exceeding \$2.50 for business houses and \$1.50 for residences, and providing further, that said ordinance should not be construed in any way as impairing or repealing the right of the city to impose a tax on poles of the purchaser of said franchise, levied for protection and not for revenue. Appellee contends that the terms recited in the ordinance adopted were not in accordance with the terms of the ordinance in contemplation at the time of the resolution of August, 1904, compromising said suit, in that the contemplated ordinance provided, as appears in the bill of complaint of appellee, on page 7, that the maximum prices authorized to be charged by the purchaser of said franchise should be \$4.00 for the first three thousand business telephones and \$2.50 for the first three

thousand residence telephones, and an additional 50c for each additional thousand business telephones, or fractional portion thereof, and 25c for each additional thousand residence telephones, or fractional portion thereof. And the Circuit Court saw fit to adjudge, as appears on page 55 of the record, that the city and all of its officers should be enjoined from interfering with or obstructing the said appellee from the operation of its telephone exchange in the city until the said city should duly enact and put into force an ordinance in the exact form and exact substance contemplated by the agreement of compromise recited in the resolution of August, 1904.

In so far as that portion of the resolution providing for the payment of the three thousand dollars is concerned, and in so far as the actual payment of the three thousand dollars is concerned, we concede that the appellee has been imposed upon, and we believe it is proper and right that said three thousand dollars should have been returned to the appellee telephone company, and, pursuant to this idea, the said city did, on the 26th of April, 1906, tender to the appellee the sum of \$3286.50, representing said three thousand dollars and interest thereon from the date of the payment until the 26th of April, 1906, as a return of the money paid to the said city under the compromise agreement. The proof of this tender appears by the affidavit of James Campbell, Jr., appearing on page 28 of the record. This tender was kept alive, and the appellant has stood ready at all times since then to return this money to the appellee, as appears by the affidavit aforesaid and the answer of the appellant, on page 44 of the record. We do not believe, however, that there is any authority for holding the city to account for a verbal agreement

made between the appellee company and any of the officers of the city or members of the general council of the city, and we believe that in so far as the judgment of the Circuit Court is concerned, holding that the city should be enjoined until an ordinance in the exact form and substance agreed upon by these private individuals should be enacted by the city, is clearly erroneous. The city must act in its corporate capacity, through its general council as a body, and not through the private opinions or agreements of certain members of the general council. There has been no attempt on the part of the appellee to show that there was ever any action of the City of Paducah in its corporate capacity, by and through its general council, agreeing upon the terms of the franchise ordinance contemplated when the compromise resolution was adopted.

There is not one word of evidence in the record to show that the city has ever taken any action which destroys or impairs the usefulness of the property of the appellee, but, to the contrary, it appears, on page 43 of the record, that the general council of the City of Paducah, on January 4th, 1906, passed a resolution by the terms of which the resolution of December 18th, 1905, was repealed. It will be remembered that the resolution of December 18th, 1905, is the act which the appellee complains impairs the obligation of its contract and takes its property without due process of law. So, therefore, if, for argument sake, the resolution of December 18th, 1905, was one which impaired the obligation of any contract and took the property of appellee without due process of law, it only remained in effect for a few days, and ever since the 4th of January, 1906, this resolution has stood as repealed and of no effect.

The Incompetent Evidence of Robert W. Devonshire.

On pages 86, 87, 88, 89 and 90 of the record appears the evidence of Robert W. Devonshire, called as a witness in behalf of appellee for the purpose of proving the existence of certain contracts and records, which the appellee charges in its bill to exist, showing the patent rights owned by the American Bell Telephone Company and the sale of such patent rights by the American Bell Telephone Company to the East Tennessee Telephone Company of New York and to the East Tennessee Telephone Company of Kentucky. The answer denies the existence of these contracts or the sale of any such patent rights or any rights of the American Bell Telephone Company to the East Tennessee Telephone Company of either New York or Kentucky. Mr. Devonshire attempted to qualify himself to testify concerning these records by showing that he was the general manager of the American Bell Telephone Company, but on page 87 of the record, he was asked this question:

“Who has charge of, or in whose custody are the records of the American Bell Telephone Company?

A. Directly Mr. C. P. Ware.”

On the same page then he is asked to file a copy of the contract between the National Bell Telephone Company and the American Bell Telephone Company. The attorney for appellant objected to this, because there had been no allegation made of any facts involving any contract between the National Bell Telephone Company and the American Bell Telephone Co., but, notwithstanding this objection, the contract was considered and read by the Circuit Court. The same witness, on the same page, also testifies concerning, and makes a part of his deposition a copy of a certain contract be-

tween Ormes and Talmadge and the National Bell Telephone Company. The attorney for appellant objected to this exhibit also, because no allegations had been made of any facts involving or growing out of such a contract. On page 87 and 88 the witness was asked concerning a certain contract between the National Bell Telephone Company and the American Bell Telephone Company, James M. Ormes, Henry H. Talmadge and the East Tennessee Telephone Company, dated November 16th, 1880. Concerning this contract he testifies on page 88:

“Where is the original contract?

A. In the office at Boston.

Q. Under whose control?

A. Mr. C. P. Ware's.

Q. Who has the custody and access to that contract in Boston?

A. Mr. C. P. Ware.

Q. Have you any custody or control thereover?

A. I have as general manager.”

The witness then is requested to file a copy of this contract as a part of his deposition, to which attorney for appellant objected. The objection was made because proof of its authenticity was not made, nor did Mr. Devonshire properly qualify himself as the custodian of this record to file a copy thereof. He does not pretend to state that he knew it to be a copy by any examination or comparison with the original. This same objection is interposed to all of the other copies of contracts referred to in the succeeding deposition of Mr. Devonshire. Nowhere in his deposition does he make any effort to show or state that he knew, from examination or comparison of the copy with the original, that the copy filed by him was a true or correct copy of the original and on page 89 of the cross examination Mr. Devonshire

testifies that Mr. C. P. Ware is the head of the department of the American Bell Telephone Company in Boston, having charge of and custody of the original contracts, copies of which he attempts to file with his deposition. So we believe that clearly the witness was not qualified to file the exhibits purporting to be copies of certain contracts, but, notwithstanding this fact, these copies were permitted to be filed and considered as a part of the deposition of Mr. Devonshire by the Circuit Court.

Reverting to the old resolution of the general council of the city, passed on November 15th, 1880, granting the permission to erect telephone poles on the streets requested by the Bell Telephone Company, and under which appellee bases its right to operate a telephone system in the city, we call attention to the deposition of Mr. Devonshire appearing on page 89 of the record. On cross examination he was asked:

“Was there ever a telephone company, with which you were connected, known and operating under the corporate name of the Bell Telephone Company?

A. Yes, sir.

Q. Where and when were you connected with that company?

A. Both in Boston and New York, if my memory serves me.

Q. In what way was the Bell Telephone Company connected with, if at all, the American Bell Telephone Company?

A. It was one of the predecessor companies.

Q. When did the Bell Telephone Company go out of existence?

A. I couldn't say.

Q. Well, was it before or after the American Bell Telephone Company was organized?

A. I couldn't answer that question.

Q. At the time of the making of the contract you have referred to in 1880 (November 16th) between the East Tennessee Telephone Company of New York and the American Bell Telephone Company, was the Bell Telephone Company the owner of any exchange rights, patent rights or franchise rights in the State of Kentucky or the County of McCracken, Ky.?

A. No, sir.

Q. Did the Bell Telephone Company have a right to enter into any franchise contract or patent right contract with any other company for the State of Kentucky at that time?

A. You mean the question just as you put it—yes.

Q. Did you ever hear of a man or know a man by the name of W. G. Washburn?

A. No, sir.

Q. In what capacity were you connected with the Bell Telephone Company?

A. As chief clerk."

Thus, so far as this record is concerned, there was a corporation by the name of the Bell Telephone Company at the time of the passage of the resolution granting permission to said Bell Telephone Company of November 15th, 1880, and, so far as this record is concerned, the Bell Telephone Company never parted with any of the privileges granted to it by this resolution of the general council of the city, and the East Tennessee Telephone Company, when it exercises the privileges granted to the Bell Telephone Company without its permission or without any contract therefor, must have been a bare and naked trespasser.

In conclusion, we believe that this record, when

considered as a whole, presents only one semblance of right to the appellee to operate its telephone system in the City of Paducah, and that right is derived through the inactivity on the part of the city to stop the appellee from operating its telephone company and the permission which might be inferred by reason of the inactivity of the city, but we do not understand that there can possibly be a fixed or vested franchise right granted to occupy the streets of the city which is derived solely and entirely through the inactivity of the city or the lethargy of its general council and officers in permitting a public service company to continue the use of such streets. There is only one way in which a city's streets can be used for any purpose than ~~for~~ that for which they were designed, to-wit: as a public thoroughfare, and that is through a direct and positive grant of a right to use such streets for special purposes, and this grant must be made through legislative authority duly and regularly delegated to the city. We feel, as a whole, that there is a complete lack of any such authority or any such grant shown in this record by the appellee, and for the reasons indicated we respectfully and hopefully expect a reversal of this case.

Respectfully submitted,

A. Y. MARTIN,

City Solicitor.

H. S. CORBETT,

JAMES CAMPBELL, Jr.

Special Counsel.

W. F. Bradshaw, Jr.

List of Authorities.

- St. Paul Gas Light Co. vs. City of St. Paul,
181 U. S. 142;
- City of Dawson vs. Columbia Ave. Savings
Fund, Safe Deposit, Title & Trust Co.,
197 U. S. 178;
- City of Des Moines vs. Des Moines City Ry.
Co., 214 U. S. 179;
- Thomas vs. Railroad Company, 101 U. S.
71-81;
- Oregon Ry. Co. vs. Oregonian Ry Co., 130 U.
S. 1-20;
- East Tenn. Telephone & Telegraph Co. vs.
City of Russellville, 51 S. W. 308, 106
Ky. 667;
- East Tenn. Telephone Co. vs. Anderson
County Telephone Co., 74 S. W. 218;
- Nicholasville Water Co. vs. Board of Coun-
cilmen, 36 S. W. 549;
- Merchants Police & District Telephone Co.
vs. Citizens Telephone Company, 93 S.
W. 642;
- Rough River Telephone Co. vs. Cumberland
Tel. & Telegraph Co., 84 S. W. 517;
- Rural Home Telephone Co. vs. Kentucky &
Indiana Telephone & Telegraph Com-
pany, 107 S. W. 787;
- Bland vs. Cumberland Telephone & Tele-
graph Co., 109 S. W. 1180;
- East Tenn. Telephone Co. vs. Board of Coun-
cilmen of City of Frankfort, 141 Ky. 588,
(on rehearing), 143 Ky. 86;
- Central Transportation Co. vs. Pullman
Palace Car Company, 139 U. S. 24;
- Bevis vs. Vanceburg, 89 S. W. 126;

Detroit Citizens' St. Ry. Co. vs. Detroit Railway, etc., 171 U. S. 48;

Shaw vs. City of Covington (Ky.), 194 U. S. 593;

Home Telephone & Telegraph Co. vs. City of Los Angeles, 211 U. S. 265;

Cumberland Telephone & Telegraph Co. vs. City of Calhoun, 151 S. W. 659.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,

CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 246.

THE CITY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

EAST TENNESSEE TELEPHONE COMPANY.

REPLY BRIEF OF ATTORNEY FOR APPELLANT.

JAMES CAMPBELL, JR.,
Attorney for Appellant.

(22,571)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 246.

CITY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

EAST TENNESSEE TELEPHONE COMPANY,
APPELLEE.

REPLY BRIEF OF ATTORNEY FOR APPELLANT.

The principles of law relied upon and applied in the authorities cited by counsel for appellee we believe are totally inapplicable to this case on the question of the finality of the judgment.

As we understand the former opinions of this court, the chief test of the finality of the judgment is that such judgment must have been rendered after a trial of the case upon its merits, and the rights of the respective litigants adjudicated according to the merits of the case, so that no further adjudication of such rights is necessary. We do not understand the law to be that the judgment, to be final, must com-

pletely and absolutely wind up the case so that no further orders or steps are necessary to be taken.

The judgment rendered herein (Record, p. 55) recites in the very beginning that the cause was heard "upon the pleadings, exhibits and evidence and argument of counsel," and that "it is ordered, adjudged and decreed * * * that the right of the complainant, East Tennessee Telephone Company * * * is upheld and sustained." Similar phraseology to "upheld and sustained" is given as a convincing evidence of the intention of the trial court to make the judgment a final one, in the case of *French vs. Shoemaker*, 12 Wallace, 98, in which this court said:

"Objection is made that the decree is not final because it does not in terms dismiss the cross-bill, but the court is of the opinion that the statement contained in the decree that the equity of the case is with the complainant, by necessary implication disposes of the cross-bill as effectually as it does of the answer filed by appellant to the original bill of complaint."

The further intention of the circuit court to make this judgment a final one is evidenced by the order granting the appeal (Record, p. 128). This fact, the order of the lower court granting an appeal, is cited as an evidence of the intention of the lower court to render a final judgment in the case of *French vs. Shoemaker*, *supra*, as follows:

"Such (that the decree was final) was doubtless the view of the Chief Justice who passed the decree, as the application for the appeal was made to him at the same term and was immediately granted without objection."

So if the intent of the circuit court to make the judgment a final one, in the light of the act of Congress requiring it to be final before an appeal can be taken, is obvious, then this question comes within the case of *Rubber Company vs. Goodyear*, 6 Wallace, 155, where this court said:

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, it might very properly have been treated as such. But we must be governed by the obvious intent of the circuit court, apparent on the face of the proceedings."

This court, in a very early decision, announced certain principles of law, as to a final judgment, which have been quoted with approval in many cases since then, in the case of *Forgay vs. Conrad*, 6 Howard, 203 and '4:

"This court has not, therefore, understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

Also this court used the following language in the case of *Beebe vs. Russell*, 19 Howard, 283:

"When a decree finally decides and disposes of the whole merits of the cause, and reserves no further question or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true a decree may be final although it directs a reference to a master, if all the consequential directions depending upon the results of the master's report are contained in the decree, so that no further decree of the court will be necessary upon the confirmation of the report to give the parties the entire and full benefit of the previous decisions of the court."

Again, this court has said in the case of *Grant vs. Phoenix Insurance Company*, 106 U. S., 429:

"The rule is well settled that a decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the

merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the decree it had already rendered."

These principles of law are quoted with approval in the further cases of—

St. Louis, Iron Mountain and Southern Railway Company *vs.* Southern Express Company, 108 U. S., 24.

Winthrop Iron Company *vs.* Meeker, 109 U. S., 180.
Thompson *vs.* Dean, 7 Wallace, 344.

Under the judgment rendered in this action the option is granted to the appellant to abide the judgment, which grants a perpetual injunction against the appellant, or to pass the ordinance described and referred to in the judgment; in other words, this judgment may be said to be an alternative judgment, and it may strike the mind of the court that perhaps it was incumbent upon the appellant to take some action of record to show its unwillingness to take advantage of the option given by the judgment, but we take it that common construction and an adjustment of ordinary affairs logically lead one to the conclusion that an option is refused which is failed to be exercised, and if this option is refused by the failure of the exercise of it, then, under the terms of the judgment, the judgment becomes immediately operative and finally and completely disposes of all the issues presented in the case.

Upon this question the Circuit Court of Appeals for the Second Circuit, in the case of Tuttle *vs.* Claffin, 66 Fed., page 7, was considering the finality of the following decree:

"Ordered and decreed that the said exceptions, so far as they relate to said question, especially the 11th, 12th, 17th, 18th, and 20th exceptions, be, and the same are hereby sustained, and that the said report be, and hereby is set aside; and it is further ordered and decreed that the complainant may, if he desires,

have the cause sent back to the master for further proofs and for a further report thereon, such election to be expressed by notice in writing to be filed with the clerk of this court within 60 days after the entry of this decree, that in default of such notice the complainant shall recover of the defendants the sum of six cents damages, and that the complainant recover of the defendants his costs to be taxed for all proceedings prior to and including the order of reference made herein on the — day of March, 1884, and that the cost of the proceedings thus far had before the master herein be taxed in favor of the defendants."

The opinion rendered by the Circuit Court of Appeals, through Judge Wallace, circuit judge, passing upon the finality of this decree, is as follows:

"The question whether the decree appealed from is to be regarded as a final decree in the cause is not free from doubt. Apparently, it was not intended to be in formal, final disposition of the cause; but another was to be made in case the election reserved to the complainant, to reopen the case, should not be exercised pursuant to the condition specified, and after the proof of default. Nevertheless it is so expressed as to be final in case a notice should not be filed in the clerk's office within a specified time—a fact which could be ascertained merely by consulting the files of the court—and provides that in default of filing such notice the complainant recover of the defendant the sum of six cents damages and his cost to be taxed for all proceedings prior to and including the order of reference therein. Upon the authority of *Forgay vs. Conrad*, 6 Howard, 202; *Thompson vs. Dean*, 7 Wallace, 342; *French vs. Shoemaker*, 12 Wallace, 86; *Rubber Company vs. Goodyear*, 6 Wallace, 153—we think the decree has all the essential elements of final decree, and may properly be treated as such."

We are convinced upon careful examination of the facts involved in the cases relied upon by appellee that this court will conclude they are not analogous to the case at bar, for

in no instance in any of the authorities relied upon by appellee were the merits of the case finally and completely disposed of, and it certainly cannot be disputed that the case at bar was tried upon its merits and all of the questions of fact and law were considered and disposed of by the trial court.

Respectfully submitted,

JAMES CAMPBELL, JR.,
Attorney for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1912

NO. 240

CITY OF PADUCAH,

Appellant,

vs.

EAST TENNESSEE TELEPHONE COMPANY,

Appellee.

BRIEF FOR APPELLEE

WHEELER W. HUGHES,
HUNT CHASE,
WILLIAM E. ORRICK,
Attorneys for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1912

No. 246

CITY OF PADUCAH, Appellant

vs.

EAST TENNESSEE TELEPHONE COMPANY, . Appellee

BRIEF FOR APPELLEE

STATEMENT.

May it Please Your Honors:

This court is without jurisdiction, since the appeal is premature; the decree appealed from being an interlocutory order and not a final decree, from which an appeal may be prosecuted under the Act of Congress conferring appellate jurisdiction upon this Court.

In order that the question may be intelligently stated it becomes necessary to make a brief statement of the case.

Appellee, claiming to be the owner of the right obtained from the City authorities in 1881, to conduct a telephone business in the City of Paducah, was confronted in December, 1905, with a refusal on the part of the legislative authorities of the City to permit it to further use the streets for the conduct of its business.

A telephone exchange in a city or town is never a finished property, and can only be operated by continually setting new poles and stringing wires to serve new patrons. (Trans., p. 11.) The exchange in the first instance is constructed with a view of meeting the present demands of the inhabitants of the city, and then from time to time as additional patrons are obtained, additional poles and wires are erected and are then connected with other subscribers' poles and wires by means of central office equipment.

In the present case it is shown that in the beginning, during 1881, the exchange had only 50 subscribers, and from time to time additional poles were set and wires strung as the number of subscribers increased, until December, 1905, when the number of subscribers had increased to 2,611. (Trans., pp. 4-6.)

Therefore, when the legislative council of the City of Paducah denied the franchise right of Appellee, and directed its Board of Public Works not to allow Appellee to use the streets of Paducah for any purpose "until said Company shall first obtain a franchise to do business in said City of Paducah" it was an attempt to impair the obligation of Appellee's contract with the City, and thereupon this suit was instituted to protect its property rights.

The bill of complaint sets out in detail a history of the grant by the City authorities of Paducah to Appellee's predecessor in 1881. It sets out the controversy and the dealings between the City authorities and Appellee looking to a settlement of differences existing between them.

It shows that in August, 1904, an agreement was reached between the City authorities and the Company, and was ratified and approved by a joint resolution of the General Council of the City and approved by the Mayor. Under the terms of this agreement the Company was to surrender its franchise rights and was to take from the city a new franchise upon certain terms and conditions, all of which are fully set out in the bill. The legislative authorities of the City declined to carry out this settlement, and in December, 1905, introduced and duly adopted the following resolution:

"Be it resolved by the Common Council of the City of Paducah that the East Tennessee Telephone Company is now doing business in the City of Paducah without license and without authority of law, and be it further resolved that the Board of Public Works be, and is hereby directed to issue to said East Tennessee Telephone Company no permits to use the streets of Paducah, Kentucky, for any purpose until said Company shall first obtain a franchise to do business in said City of Paducah."

Trans., p. 10.

After many preliminary proceedings the trial judge, in July, 1909, entered the following decree:

"This cause having been heard upon the pleading, exhibits and evidence and the arguments of counsel, and the court being now sufficiently advised, delivered an opinion in writing, which is filed, and pursuant thereto it is ordered, adjudged and decreed by the court that the right of the complainant, East Tennessee Telephone Company, a corporation under the laws of Kentucky,

under its contract to maintain and operate a telephone exchange in the City of Paducah and to erect poles and string wires thereon in connection with such exchange is hereby upheld and sustained as against the effort of the defendant to impair said contract, and the defendant, City of Paducah, having, as shown by the record, failed to carry out the agreement of compromise entered into between it and the complainant, though receiving parts of the proceeds of said compromise, the said City of Paducah, its officers, agents, employees and all other persons are hereby enjoined and restrained from interfering with or obstructing the complainant in operating a telephone exchange in said city and in connection therewith erecting poles and stringing wires thereon until the defendant city shall duly enact and put into force an ordinance in the exact form and of the exact substance agreed upon between the parties as set forth in the bill of complaint, and also until, under such ordinance, the franchise therein referred to has been fairly and in good faith offered at public sale and has fairly and in good faith been sold in the way therein provided for; but nothing herein shall be deemed or taken to interfere with the power of the defendant, City of Paducah, in all reasonable and proper ways to regulate such setting of poles and stringing of wires in the legitimate exercise of the police power of said city as affecting said telephone exchange and its appliances, nor shall anything herein be construed as prohibiting the said city from making rates for telephone service lower than those named in said ordinance, if it shall hereafter result that said rates yield to the complainant, or any other person who may purchase the franchise at the sale made pursuant to such ordinance, more than a fair return upon the reasonable value of the property at the time it is being used. It is the

intention of this judgment to give to the City of Paducah the option of permitting the present status to remain perpetually or else to enact the agreed-upon ordinance and fairly to put it into force, and the court now reserves the right and the power to make any orders that may be needful not only to enforce the injunction but also to meet any emergency that may arise should the city, in the exercise of such option, enact and put into force the ordinance referred to, and the case is held open for these purposes.

"It is further ordered and adjudged by the court that the complainant, East Tennessee Telephone Company, do recover of the City of Paducah, Kentucky, its cost herein expended.

July 8, 1909."

Trans., pp. 56-7.

From certain parts of this decree the present appeal was taken on December 13, 1910, the petition for the appeal being as follows:

"The above named petitioner, City of Paducah, Kentucky, conceiving it is aggrieved by the final decree entered in the above entitled cause on the 8th day of July, 1909, hereby appeals from said decree in so far as same adjudges and decrees that the right of the East Tennessee Telephone Company to maintain and operate a telephone exchange in the City of Paducah, and to erect poles and string wires thereon, is upheld and sustained, and in so far as the said City of Paducah, its officers, agents and employes, and all other persons are enjoined and restrained from interfering with or obstructing the complainant in operating a telephone exchange in said City until the said City

shall enact and put in force an ordinance in the exact form and of the exact substance agreed upon between the complainant and defendant and set forth in the Bill of Complaint, and until said ordinance and the franchise therein referred to has been fairly and in good faith offered at public sale, and has been sold in the way therein provided for, and in so far as said decree and judgment directs that the option is given to the said City of Paducah of permitting the present status to remain perpetually or to enact the said agreed ordinance and put same in force, and in so far as the court assumed and retained jurisdiction of this action. And the said City of Paducah prays that this, its appeal to the Supreme Court of the United States, may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and Your Petitioner further prays that the proper orders touching the security to be required of it to perfect this appeal, be made."

Trs., p. 125.

THIS APPEAL IS NOT FROM A FINAL DECREE.

It is to be observed that notwithstanding the claim of Appellee "under its contract to maintain and operate a telephone exchange in the City of Paducah and erect poles and string wires thereon in connection with such exchange is hereby upheld and sustained, as against the effort of defendant to impair said contract," yet the decree further recites: "It is the intention of this judgment to give to the City of Paducah the option of permitting the present status to remain perpetually, or else

to enact the agreed-upon ordinance and fairly put it into force, and the court now reserves the right and the power to make any orders that may be needful not only to enforce the injunction but also to meet any emergency that may arise, should the city in the exercise of such option, enact and put into force the ordinance referred to and the case is held open for these purposes."

It can not be said that the rights of the parties were finally adjudged in this decree, nor can it be said that nothing remains for the Court to do. It is uncertain what Appellant intends to do, and until it exercises the option given, and a decree is then entered making definite the rights of the parties, based upon the exercise by Appellant of this option, Appellee is not in a position to know what its rights are, nor can it know what Appellant intends to do.

That this renders the decree "Interlocutory," and not "final," is well settled by the decisions of this court.

In *Barker, Admr., vs. Craig*, 127 U. S. 213, the Court says:

"This court, however, has no jurisdiction of the case as it stands, because the order just cited is not a final decree. Something yet remains to be done in order to make it such, and that action depends upon whether or not the complainants will comply with the order to bring in the sum due on the mortgage. If that order is complied with, then a decree should be made, upon the hypothesis on which the order was made, in favor of the complainants in the bill, and quieting their title. If, however, the money is not brought into court,

then according to the theory of the order, the bill of complaint should be dismissed. But, even assuming the right of the court to make the order, as well as its validity, the circumstances under which the bill of complaint is to be dismissed or the relief granted to the complainants named therein, and the sum to be paid, are matters which are yet to be determined, which may turn out either one way or the other, and which, when ascertained, will be the foundation for a final decree. There is no final decree as the matter now stands."

In *Haseltine vs. Bank*, 183 U. S., 130, the head note states:

"A judgment reversing a judgment of the trial court granting a recovery of usurious interest under U. S. Rev. Stat. Sec. 5198, upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanding the cause 'for further proceedings to be had therein, in conformity with the opinion of this court herein delivered,' is not a final judgment to which a writ of error will lie."

In the opinion the Court employs this language:

"While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition

of the case by the supreme court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case."

In *Lea vs. Kelly*, 15 *Pet.* 213, the head note is as follows:

"A judgment was entered on a promissory note drawn by Kelly and others in favor of Lea and others, in the Circuit Court of Alabama. Afterwards, Kelly, the Appellee, filed a bill on the equity side of the court, for the purpose of being relieved from the judgment at law obtained against him and two other persons, on the promissory note. The bill alleged fraud in the plaintiffs in the suit, and that the complainant had no notice of the suit, and had not authorized an appearance, or filed any plea in the same. The bill prayed for a perpetual injunction of proceedings on the judgment, and for general relief. The injunction was granted; and, afterwards, on the appearance of two of the plaintiffs in the suit at law, the Circuit Court decreed, that, on the condition that the complainant, Kelly, appear and plead to the merits of the case, waiving the question of jurisdiction, and pay costs of the suit at law, and the proceedings in equity, a new trial be awarded to the complainant. Two of the plaintiffs in the suit at law, which had appeared to the bill, appealed to the Supreme Court, seeking to reverse this decree. Held, that the decree of the Circuit Court was merely interlocutory; and was not a final decree for which an appeal could be taken."

The principles of law announced in the foregoing cases have been sustained and re-affirmed in:

Martinez vs. International B. Co., 220 U. S., 223;
Bostwick, vs. Brinkerhoff, 106 U. S., 3;
Clark, vs. Kansas City, 172 U. S., 334;
Missouri vs. Olathe, 222 U. S., 185.

THE DECREE NOT BEING FINAL, THIS COURT
 IS WITHOUT JURISDICTION TO ENTER-
 TAIN THE APPEAL.

In *Canter vs. The American and Ocean Insurance Companies*, 3 Pet. 319, it is said:

“It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the Legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses.”

In *Beebe vs. Russell*, 60 U. S., 283-7, the Court says:

“It has been the object of this court at all times, though an accidental deviation may be found, to restrict cases which have been brought to this court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined or judgments and decrees in the court below, whether they were cases in admiralty, in equity, or in common law.”

Again:

“We feel very confident no case has been decided by it, when the question of the finality of a decree

or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded as it was meant to be by the legislation of Congress, and as it was understood by the courts in England and in this country before Congress acted upon the subject."

In *U. S. vs. Girault*, 11 How. 32, it is said:

"The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in. (4 Dallas, 22; 3 Wheat., 433; 4 *Ib.*, 75; 6 Howard, 201, 206.)"

Again:

"According to the practice of this court, the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction, and remanded to the court below, to be proceeded in and finally disposed of."

It is therefore submitted that this Court is without jurisdiction to review the decree in this case, and that the appeal must be dismissed.

Respectfully submitted,

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